WAR CLAIMS

REPORT

OF THE

ADVISORY COMMISSION

February 25, 1952

Edmond Cloutier, C.M.G., O.A., D.S.P.
Queen's Printer and Controller of Stationery
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Report

To His Excellency the Governor General in Council,

MAY IT PLEASE YOUR EXCELLENCY:

I have the honour to submit the following report pursuant to the Commission issued to me dated July 31st, 1951, a copy of which and the Order in Council upon which it is founded are attached.

All of which is respectfully submitted for Your Excellency's consideration.

(Sgd) J. L. ILSLEY,
Commissioner.

OTTAWA, February 25, 1952.

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Commission

P. KERWIN
Administrator

[L.S.]

CANADA

GEORGE THE SIXTH, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas KING, Defender of the Faith.

TO ALL TO WHOM these Presents shall come or whom the same may in anywise concern,—GREETING:

F. P. VARCOE
DEPUTY ATTORNEY GENERAL, CANADA.

WHEREAS arising out of World War II, many claims have been asserted by Canadians, hereinafter referred to as War Claims, in respect of death, personal injury, maltreatment, and loss of or damage to property.

AND WHEREAS in respect of some of these claims partial compensation is provided for and may be obtained under treaties of peace or other international instruments, but that in respect of the bulk of them, no provision for compensation has been made.

AND WHEREAS such War Claims are matters connected with the public business of Canada and it is deemed advisable now to appoint a Commissioner to inquire into and report to Our Governor in Council concerning such Claims.

AND WHEREAS it is expedient and Our Governor in Council has, by Order, P.C. 3951, of the thirty-first day of July, in the year of Our Lord one thousand nine hundred and fifty-one (copy of which is hereto annexed) authorized the appointment under Part I of the Inquiries Act, Chapter 99 of the Revised Statutes of Canada, 1927, of Our Commissioner therein and hereinafter named to inquire into and report upon the aforesaid matters, and without limiting the generality of the above terms of reference, in particular, make recommendations as to the following matters:

(*a*) An estimate or calculation as to the amount of the total funds available for the payment of such claims;

(*b*) The classification of War Claims and an estimate of the number of each class and of the total amount of such claims;

(*c*) As to (i) which class or classes of claims should be admitted for payment in full and (ii) which, if any, in part only, and (iii) which, if any, should be rejected;

(*d*) The classification of claimants whose claims should be admitted;

(*e*) The priorities, if any, that should be established for payment of (i) classes of claims and (ii) classes of claimants;

(*f*) The limitation of time that should be prescribed within which War Claims shall be filed;

(*g*) The maximum sum of compensation, if any, that should be prescribed in relation to any class of War Claims or claimants;

(*h*) The nationality or domicile at time of loss and/or at the time of filing the claim of claimants entitled to compensation;

(*i*) The method to be adopted for determining loss in case of each class of War Claims;

(*j*) Whether interest should in any cases be allowed; and

(*k*) The tribunal or tribunals that should be authorized to adjudicate upon individual claims and the rules of procedure and evidence to be adopted by such tribunals.

NOW KNOW YE that by and with the advice of Our Privy Council for Canada, We do by these Presents nominate, constitute and appoint the RIGHT HONOURABLE JAMES LORIMER ILSLEY, P.C., K.C., Chief Justice of Nova Scotia, to be Our Commissioner to hold and conduct such inquiry.

TO HAVE, HOLD, EXERCISE AND ENJOY the said office, place and trust unto the said James Lorimer Ilsley, together with the rights, powers, privileges and emoluments unto the said office, place and trust of right and by law appertaining, and as are more particularly set out in the said Order in Council, during Our pleasure.

AND WE DO hereby authorize Our said Commissioner to engage the services of counsel, technical advisers or other experts, clerks or reporters as he may deem necessary or advisable.

AND WE DO hereby require and direct Our said Commissioner to report to Our Governor in Council the result of his investigations, together with the evidence taken before him and any recommendations which he may see fit to make in the circumstances.

IN TESTIMONY WHEREOF We have caused these Our Letters to be made Patent and the Great Seal of Canada to be hereunto affixed. WITNESS: Our Right Trusty and Well-beloved Counsellor the Honourable Patrick Kerwin, Puisne Judge of the Supreme Court of Canada and Administrator of the Government of Canada.

AT OUR GOVERNMENT HOUSE, in Our City of Ottawa, this Thirty-first day of July in the year of Our Lord One thousand nine hundred and fifty-one and in the Fifteenth year of Our Reign.

By Command,

W. P. J. O'MEARA,

Acting Under Secretary of State.

Order in Council

P.C. 3951 of July 31, 1951

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Administrator on the 31st July, 1951.

The Committee of the Privy Council have had before them a report dated July 27, 1951, from the Secretary of State, representing:

That, arising out of World War II, many claims have been asserted by Canadians, hereinafter referred to as War Claims, in respect of death, personal injury, maltreatment, and loss of or damage to property:

That in respect of some of these claims partial compensation is provided for and may be obtained under treaties of peace or other international instruments, but that in respect of the bulk of them, no provision for compensation has been made; and

That such War Claims are matters connected with the public business of Canada and it is deemed advisable now to appoint a Commissioner under Part I of the Inquiries Act, Chapter 99 of the Revised Statutes, 1927, to inquire into and report to the Governor in Council.

The Committee, therefore, on the recommendation of the Secretary of State, advise:

1. That under and in pursuance of the Inquiries Act a Commission do issue appointing the Right Honourable James Lorimer Ilsley, P.C., K.C., to be a Commissioner to inquire into and to report upon the aforesaid matters;

2. That, without restricting the generality of the above terms of reference, the Commissioner shall, in particular, make recommendations as to the following matters:

(*a*) An estimate or calculation as to the amount of the total funds available for the payment of such claims;

(*b*) The classification of War Claims and an estimate of the number of each class and of the total amount of such claims;

(*c*) As to (i) which class or classes of claims should be admitted for payment in full and (ii) which, if any, in part only, and (iii) which, if any, should be rejected;

(*d*) The classification of claimants whose claims should be admitted;

(*e*) The priorities, if any, that should be established for payment of (i) classes of claims and (ii) classes of claimants;

(*f*) The limitation of time that should be prescribed within which War Claims shall be filed;

(*g*) The maximum sum of compensation, if any, that should be prescribed in relation to any class of War Claims or claimants;

(*h*) The nationality or domicile at time of loss and/or at the time of filing the claim of claimants entitled to compensation;

(*i*) The method to be adopted for determining loss in case of each class of War Claims;

(*j*) Whether interest should in any cases be allowed; and

(*k*) The tribunal or tribunals that should be authorized to adjudicate upon individual claims and the rules of procedure and evidence to be adopted by such tribunals.

3. That the Commissioner be authorized to engage the services of counsel, technical advisers or other experts, clerks or reporters as he may deem necessary or advisable, at rates of compensation to be approved by the Governor in Council.

4. That the Commissioner be paid travelling and living allowances while absent from his place of residence, for which accounts shall be submitted.

N. A. ROBERTSON,
Clerk of the Privy Council.

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REPORT

Introduction

As an introduction to this report something should be said as to the sources of the information and the nature of the investigation on which the report is based. In this connection a brief review of the course of events relating to the submission of war claims before, during and since the war is first necessary.

The fourth and last Reparations Commission in Canada charged with the handling of claims arising out of World War I made its final report in March, 1933. Some four years later war claims again became a matter for government consideration as a result of hostilities in China. Numerous claims were asserted by Canadians, most of them for compensation for loss of or damage to property, and some of these claims became the subject of diplomatic representations. Many of these claims are still outstanding and the Treaty of Peace with Japan makes certain provisions in respect of them.

On the outbreak of World War II, reparations and war claims became a question which concerned the Canadian Government owing to the sinking off the coast of Ireland of the *S.S. Athenia* on September 3, 1939, as a result of which many Canadian passengers lost personal property, sustained personal injuries, or lost their lives. From then on, throughout the whole period of the war and up to the present time, several thousand claimants have submitted claims to the Department of External Affairs, the Custodian of Enemy Property, the Department of Finance or the Department of Justice. There have, of course, been large numbers of claims of the classes administered by the Department of Veterans' Affairs but these claims, which are compensated by pensions for disability or death of members of the armed services, are not considered to come within the scope of the inquiry.

In September, 1945, an Interdepartmental Committee on Reparations was established by Cabinet decision to advise and make recommendations to Cabinet on all matters pertaining to reparations. In December, 1945, the Final Act of the Paris Conference on Reparation (to be referred to later) was signed and in 1947 peace treaties were concluded with Italy, Hungary, Roumania and Finland. During these years the question of the handling of war claims was under constant review by the Interdepartmental Committee on Reparations, but the Committee was not in a position to recommend any effective action on claims because of the uncertainty which necessarily existed as to the extent of assets formerly belonging to enemy countries, whether treaties had been concluded with them or not, or their nationals, which would become available for the purpose of satisfying claims. During this period there were no treaties in existence with either Germany or Japan and even yet there is no treaty with Germany. It has not been possible until very recently to make even an approximate estimate of the amount of assets of enemy origin which may be available for satisfaction of war claims. Although it was not possible in 1947 or 1948 to promise any immediate action, the Secretary of State was in 1948 authorized by Cabinet, *inter alia*, to ascertain the claims of persons residing or carrying on business in Canada, or of Canadian citizens residing outside of Canada, for loss or damage arising directly from operations of war, including claims the partial or full settlement of which was provided for under the peace treaties, or agreements with or legislation of certain countries. In September, 1948, a War Claims

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Branch was set up by the Secretary of State to undertake this work. In November, 1948, a notice was published in all the daily English and French newspapers in Canada, numbering approximately one hundred, as well as in Canadian periodicals of Croatian, German, Hungarian, Lithuanian, Norwegian, Polish, Slovak, Ukrainian and Yiddish languages, and in the *Canada Gazette*, stating that claims for loss or damage arising directly from operations of war during the Second World War might be filed with the Department of the Secretary of State of Canada, War Claims Branch, Custodian's Office, Ottawa, on or before January 31, 1949, by any person who was a resident in or carrying on business in Canada or who was a Canadian citizen residing outside of Canada, and giving directions as to the particulars to be included in the claims. Following the publication of this notice more claims were submitted.

For several reasons, it took the War Claims Branch a considerable time to tabulate the claims received both before and after this notice was published. As indicated above, war claims had been filed with several government departments and agencies. In order to collect and analyse these claims it proved necessary to examine thousands of files, and write thousands of letters, and in many cases to make enquiries from missions abroad. Further enquiries had to be made in many cases to check up on the national status of claimants at time of loss and on many other items of information. Again, it was considered that estimates of losses should be shown in Canadian dollars. This presented difficult problems since war claims, as filed, had been made in about 30 currencies, some of which had disappeared as a result of monetary reforms or extreme depreciation. Then in some cases it was difficult to ascertain whether the claimant was claiming in pre-war or post-war terms of the currency in which he claimed. Another obstacle to the speedy analysis of the war claims filed was the difficulty or impossibility of obtaining information about property left behind or lost in countries which had come under Communist control. Nevertheless, estimates of losses were finally produced, which will be referred to later.

It is not possible, or necessary, to describe precisely all the classes of claims asserted by civilian Canadians for injury and losses arising from the war but some of the main classes should be mentioned. There are claims for compensation for personal injuries or death caused by operations of war on the high seas or by maltreatment in internment. There are claims for compensation for maltreatment itself, irrespective of whether disability or death resulted. There are claims for loss of or damage to various types of property, tangible or intangible, and for losses of profits, as a result of war operations. There are claims for losses of property from looting. Claims have also been made for losses arising as a result of orders issued during the war by Canadian or Allied Governments and for losses caused by measures for nationalization, land reform and redistribution of property, mainly in Communist countries. In addition to claims by civilians, claims have been asserted by veterans for compensation for maltreatment while interned in the Far East.

This brief review of events pertaining to the submission of war claims indicates the sources of the information on which this report is based. The files have all been made available to me containing as they do, among other things, the claims, the material submitted as supporting the claims, and the correspondence eliciting further information, and I have examined not all but many of these files and in considerable detail.

In addition I have had before me the reports of the decisions of the Commissioners appointed by the Canadian Government after World War 1 to adjudicate war claims made under the Treaty of Versailles. There were four of these Commissioners who sat successively and the decisions of the last three Commissioners in individual cases are available, as well as reports of opinions delivered as applicable to classes of claims. These have been considered.

Then too, much helpful information has been obtained from foreign sources. Other countries have had to deal with war claims both after World War I and World War II. The decisions of tribunals appointed by foreign governments, the legislation of foreign countries and the reports of commissions abroad, dealing with war claims, have as far as possible been examined.

Recourse has also been had to works on international law, including specialized studies, especially those dealing with such subjects as diplomatic protection of citizens abroad, the law and procedure of international tribunals, and damages in international law, as well as to standard texts and court decisions dealing with municipal law. I have also felt free to be guided by information as to facts, circumstances and conditions abroad gleaned from published material which I have regarded as undoubtedly reliable.

I have, however, not invited representations or held hearings. On occasion the War Claims Branch has been asked to obtain additional facts bearing on a claim or class of claims and in a few instances I have received from claimants additional information directly. My reasons for concluding that it was not necessary or desirable to hold hearings or invite representations were as follows:

(1) The terms of reference do not call for adjudication of particular claims. They call for recommendations as to which class or classes of claims should be recognized for payment of compensation and to what extent, and on the various questions which arise in the framing of a general scheme for dealing with claims, as for example the total funds available for payment, the way in which various classes of claims should be dealt with, and the tribunals, if any, that should be established to deal with them. The steps that had already been taken and the extensive information already available were such that for these purposes no hearings or further representations were necessary. The material already available is so extensive that there is no real danger of the interests of any class of claimants being overlooked.

(2) To be effective any representations would have to be addressed to this question: Having regard to the possible sources of payment, how should the various classes of war claims be dealt with? Individual claimants could not be expected to be able to present an overall scheme for consideration. To do so it would be necessary to take into consideration all the classes of claimants and their conflicting interests. Information for this purpose is not available to individual claimants.

(3) To hold hearings and invite representations would result in delay in completion of the report, in expense to those making representations, and in a feeling on the part of those who could not afford this expense that they were being discriminated against. If there were any advantage to claimants in having an opportunity to make representations at this stage it would be so slight and theoretical that it would be outweighed by the counterbalancing factors of delay and expense.

(4) The only practical way of ensuring informed representations would be to advise the known claimants of all the issues affecting their claims arising in the consideration of a general scheme. This would involve publication of a draft report with an invitation to make representations. As, however, I am required only to make recommendations, this opportunity will be afforded to claimants in any event. To invite representations in a draft report would entail a delay in the completion of the final report of such unpredictable duration that such a step would not be justified.

War Claims Fund

The terms of reference require a report in detail on a number of matters relating to war claims, which, in effect, are defined as claims arising out of World War II asserted by Canadians in respect of death, personal injury, maltreatment and loss of or damage to property. The first of these matters is "An estimate or calculation as to the amount of the total funds available for the payment of such claims." I consider my inquiry in this respect to be limited to ascertaining, and estimating the total of, the funds that from their origin should be considered to be appropriate to meeting war claims. Obviously the total funds available to meet war claims might include sums voted by Parliament for that purpose. It is assumed, however, that in directing an inquiry as to funds available for payment of war claims the Government intended that the inquiry be confined to funds which from past practice or under international agreement may be treated as destined for the payment of such claims. Such funds would include certain of those received or to be received by the Government of Canada under treaties of peace for distribution among certain claimants—funds whose distribution is, in effect, controlled by these treaties. Apart from the fact that an estimate of these funds with any approximation to accuracy is in some cases impossible the practical utility of grouping these funds with what may be called free funds—those which can appropriately be paid into a War Claims Fund as below envisaged—is not apparent. A claimant is interested in obtaining payment of his claim. Whether he receives compensation out of controlled funds or directly from foreign sources or out of free funds pooled in a War Claims Fund makes little difference to him, but under the terms of reference he is entitled to an estimate of how much that War Claims Fund will likely amount to and a recommendation as to what his right to prove against that War Claims Fund will be, having regard to any satisfaction of his claim otherwise provided for. As will be seen, my recommendation will be that if he is an eligible claimant and has an admissible claim he will be entitled to prove against a War Claims Fund but to be paid only to the extent that satisfaction of his claim is not otherwise provided for.

I shall now describe the two sources of moneys which I consider to be appropriate for the War Claims Fund and discuss the question of estimating the amounts which will be available to it. In the immediately following section of the report I shall refer to the instances of satisfaction otherwise provided for.

The principal source arises from the Final Act of the Paris Conference on Reparation from Germany. This Act, which is often referred to as the Paris Agreement on German Reparation or the Paris Agreement, was signed in Paris in December, 1945, by certain of the governments of the countries, including Canada, which had participated in the war against Germany. It provided for the establishment in Brussels of the Inter-Allied Reparation Agency (IARA) which has an Assembly and an international secretariat. Eighteen governments became members of the IARA, and another government, Pakistan, has since become a member. The function of the Agency is to allocate German reparation among the member governments in accordance with the provisions of the Paris Agreement. The chief forms of reparation made available are industrial capital equipment, German external assets, merchant shipping, captured enemy supplies and Russian reciprocal deliveries which consisted of foodstuffs and raw materials which the U.S.S.R. had undertaken to deliver in return for industrial equipment and other materials received from the Western Zones of Germany.

Under the Potsdam Agreement which was the forerunner of the Paris Agreement it had been agreed that the U.S.S.R. should receive as reparations the German external assets in Bulgaria, Hungary, Roumania, Finland and Eastern Austria as well as reparation removals from the Eastern Zone and

certain proportions of these removals from the Western Zones. The U.S.S.R. undertook to settle the reparation claim of Poland from its own share of reparations. The other Allied Powers were to receive the other available external assets as well as the reparation removals from the Western Zones. The U.S.S.R. and Poland, therefore, did not participate in the Paris Agreement and are not members of the Agency.

Under the Paris Agreement, German reparation was divided into two Categories, A and B. German external assets within the jurisdiction of the members of the Agency as well as of certain neutral and ex-enemy countries comprised the major portion of Category A, which also included all other forms of German reparation except those included in Category B. This second Category included the industrial and other capital equipment removed from Germany, merchant ships, and inland water transport.

During the Conference which preceded the Paris Agreement the percentage entitlement of each member government had first been determined on the basis of the material damage its economy suffered, the loss of human life incurred and the contribution of that government to the war effort. After the original calculations had been made, certain member governments, including Canada, voluntarily renounced a proportion of their rights to industrial capital equipment to the advantage of other member governments among whom the renounced entitlement was divided *pro rata*. This gave rise to a different set of percentages in the two categories, with Canada having the normal entitlement of 3·5 per cent in Category A against 1·5 per cent in Category B.

It was recognized at the Conference that through allocation difficulties it would be impossible to keep the receipts balanced and that certain countries would immediately have more than their share of Category A reparation as a result of the presence of a large amount of German external assets within their own jurisdictions. In order to give each member its allotted shares of both categories of reparation it was provided that excess receipts of one type of asset would be compensated by a smaller entitlement to other types within the same category, and also that in the case of an excess of assets within the jurisdiction of the member government the excess charge could be transferred to Category B with a corresponding reduction in that country's entitlements there. Countries such as Canada which had renounced part of their normal Category B share were, however, given in exchange the right to charge any excess of these assets within their jurisdiction up to the value of what they had renounced against a free account which would be a charge against neither A nor B.

Article 2 of the Agreement provides for the settlement of claims against Germany in the following terms:

> "The Signatory Governments agree among themselves that their respective shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature, arising out of the war (which are not otherwise provided for), including costs of German occupation, credits acquired during occupation on clearing accounts and claims against the Reichskreditkassen."

Article 2 then, however, goes on to provide that this is without prejudice to the determination at the proper time of the forms, duration or total amount of reparation to be made by Germany, the right which each signatory government may have with respect to the final settlement of German reparation, and any political, territorial or other demands which any signatory government

may put forward with respect to the peace settlement with Germany. Article 2 further provides that the Agreement shall not be considered as affecting:

> "the obligation of the appropriate authorities in Germany to secure at a future date the discharge of claims against Germany and German nationals arising out of contracts and other obligations entered into, and rights acquired, before the existence of a state of war between Germany and the Signatory Government concerned or before the occupation of its territory by Germany, whichever was earlier."

Article 6 which deals with German external assets is of particular importance as it is Canada's chief source of reparation. It states, *inter alia,* that each signatory government shall, under such procedure as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and *shall charge against its reparation share such assets* (net of accrued taxes, liens, expenses of administration, other *in rem* charges against specific items and legitimate contract claims against the German former owners of such assets). German assets in those countries which remained neutral in the war against Germany are to be removed from German ownership or control and liquidated or disposed of in accordance with the authority of France, the United Kingdom and the United States of America, pursuant to arrangements to be negotiated with the neutrals by these countries, the net proceeds of liquidation or disposition to be made available to the Inter-Allied Reparation Agency for distribution on reparation account. Under the Rules of Accounting for German External Assets held within the jurisdiction of member governments, approved by the Assembly on November 21, 1947, the items which are to be included or excluded as charges to the signatories against their respective shares of German assets are specifically set forth.

The German enemy assets within the jurisdiction of the Canadian Government are vested in the Custodian of Enemy Property. The total value of the assets in the Custodian's hands recorded as German enemy assets, together with the estimated interest subsequently earned on the proceeds of those that have been liquidated, is approximately $5,903,938.20, made up as follows:

German Enemy Assets	
Total amount of enemy assets recorded as German and held by the Custodian as of December 31, 1951, including revenue received by the Custodian before liquidation (this includes unliquidated assets having an estimated value of $450,638.24 the rest having been liquidated)	$ 4,963,926.03
Estimated interest on proceeds of liquidation to December 31, 1951	1,060,500.70
(These proceeds were invested in Dominion of Canada bonds from time to time, the balance not so invested consisting of bank deposits)	
	6,024,426.73
Less	
2 per cent Commission (Regulation 44 of the Revised Regulations made under the Trading with the Enemy (Transitional Powers) Act provides that "the Custodian may, in addition to other charges authorized by these regulations, if any, charge against all property investigated, controlled or administered by him, whether the property is vested in him or not, a fee for services rendered not exceeding 2 per cent of the value of the property including the income therefrom.")	120,488.53
Balance	$ 5,903,938.20

This amount, however, is subject to adjustment by reason of the following:

(i) The possibility of payments of *in rem* charges against specific items and/or legitimate contract claims against the German former owners of such assets.

(ii) Receipt of income on revenue producing assets.

(iii) Inter-custodial transfers of assets both to and from the Canadian Custodian under an agreement relating to inter-custodial disputes known as the "Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets," signed at Brussels in December, 1947, or under any other inter-custodial agreement.

(iv) Clarification of the status of certain assets which would result in releases to successful applicants or additions to this total in respect of some assets whose German ownership is now very doubtful.

In addition, assets have been allocated to Canada by IARA under the Paris Agreement. Under Category A the Canadian Government had received slightly more than $1,017,000 from allocations made by IARA up to December 31, 1951, in respect of its share of German external assets in neutral and ex-enemy countries as well as of neutral currencies removed from Germany. These are, as just indicated, in addition to those German external assets within the jurisdiction of the Canadian Government and vested in the Custodian over which IARA has no effective control. There were as of December 31, 1951, additional credits allocated in foreign currencies to Canada but not converted into Canadian dollars, equivalent to $250,000.

Net receipts under Category B arising from the sale of merchant ships and industrial equipment which have been allocated to Canada had amounted to some $713,000 by the same date, while a further $217,000 was due under the mortgage agreements made when the ships were sold.

These receipts plus the value of the German assets vested in the Canadian Custodian represent considerably less than the shares which Canada was awarded in these Categories under the Paris Agreement. This underdraft position is basically due to the fact that IARA has, as it turns out, had no control up to the end of 1951 over the distribution of some 96·75 per cent of Category A assets, the major part of which consisted of German external assets within the jurisdiction of member governments. Certain of these governments held far more than their nominal share of this type of asset and the balance of 3·25 per cent within IARA's control has only slightly reduced the resulting underdrafts. When the Paris Agreement was drawn up it had been anticipated that the reparations pool over which IARA had control would have represented a larger proportion than this and been enough to give all countries their nominal share in Category A.

In Category B IARA had complete control of the allocations of merchant shipping and industrial equipment but each country's share of the latter was determined as well by the interest shown in making bids for the equipment which became available. Although Canada received practically her full entitlement of merchant shipping, Canadian industry for various reasons showed little real interest in acquiring industrial equipment and consequently a large underdraft has arisen here too.

Although Category B allocations are now completed, as far as Canada is concerned, and therefore provide no source of funds beyond those already mentioned, there may still be considerable sums to be allocated under Category A. The method of distribution now approved by IARA for future allocations is a complicated one but has been designed to reduce the underdrafts as far as

possible. Since the total still to be allocated is by no means certain, it is not possible to give a reasonable estimate as to what additional sums Canada may yet receive from this source. However, as a result of Canada's underdrawn position the effect of the provisions of the Paris Agreement outlined above is that the proceeds of the liquidation of all the German enemy assets vested in the Custodian, with such additions thereto and deductions therefrom as result from the application of the foregoing adjustment factors, may without doubt be retained by Canada.

As already indicated, under Article 2 of the Paris Agreement these proceeds as well as the proceeds from the liquidation of assets allocated and to be allocated by IARA to Canada are to cover those claims of Canada and its nationals against the former German Government and its agencies arising out of the war which are not otherwise provided for. I therefore consider it appropriate that such proceeds should be transferred to the War Claims Fund.

To summarize then, there is at present the possibility of receiving from this source $8,093,938.20 comprising $5,903,938.20 from assets held by the Custodian, $1,260,000 from other assets in Category A and $930,000 in Category B. Of these amounts I am satisfied that $5,000,000, $1,017,000, and $713,000 respectively are immediately available for the purposes of a War Claims Fund.

The second source of funds which I consider to be appropriate is provided by the Treaty of Peace with Japan. Under Article 14 of this treaty the Canadian Government has the right to seize, retain, liquidate or otherwise dispose of all property of Japanese origin in Canada with very minor exceptions such as diplomatic or consular property. The treaty, signed in September, 1951, at San Francisco, has not yet received the ratifications of Allied Governments necessary to make it binding. However, there can be little question that it would now be justifiable to proceed on the assumption that the assets of Japanese origin and the proceeds thereof, where liquidated, now in the hands of the Canadian Government and its agencies will be available for such purposes as the Government thinks fit. It is obvious that an appropriate use for such assets and their proceeds would be the satisfaction of war claims.

Reference is made in Article 15 (a) of the treaty to the Allied Powers Property Compensation Law which has been passed by the legislative authorities in Japan but does not come into force until the treaty with Japan itself comes into force. Under this law funds may be made available in Japan for the direct satisfaction of some war claims for losses of property in Japan. These funds, therefore, will not be available for payment into the War Claims Fund and will be considered later as one of the instances of satisfaction otherwise provided for. It should be mentioned that under Article 16 of the treaty, it is provided that Japan will transfer its assets and those of its nationals with certain minor exceptions in countries which were neutral during the war or which were at war with any of the Allied Powers or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to the appropriate national agencies for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable. It follows that these assets and the resultant fund cannot be made available for the War Claims Fund. Article 18 of the treaty contains provisions respecting the means of settlement of pre-war debts quite apart from Article 14. These observations are, of course, all dependent on the ultimate ratification of the Japanese peace treaty.

Thus the assets of Japanese origin seized in Canada which are also vested in the Custodian of Enemy Property are the only appropriate source of supply for the War Claims Fund under this treaty. The total net value of the assets in the Custodian's hands recorded as Japanese, together with the estimated

interest subsequently earned on the proceeds of those that have been liquidated, is approximately $3,800,679.23, made up as follows:

Japanese Enemy Assets

Total amount of enemy assets recorded as Japanese and held by the Custodian as of December 31, 1951, including revenue received by the Custodian before liquidation (this includes unliquidated assets having an estimated value of $270,786.88 the rest having been liquidated).	$3,445,301.32
Estimated interest on proceeds of liquidation to December 31, 1951	432,942.79
	3,878,244.11
(These proceeds were invested in Dominion of Canada bonds from time to time, the balance not so invested consisting of bank deposits)	
Less	
2 per cent Commission	77,564.88
Balance	$3,800,679.23

These figures are also subject to some of the fluctuation factors mentioned in the case of the German enemy assets but I am satisfied that $3,000,000 of these are immediately available for the purpose of transfer to a War Claims Fund.

My recommendation is that the funds to be made available for a War Claims Fund be:

(*a*) All reparations, including any income earned thereon, made available to Canada under the Paris Agreement less (i) any payments of *in rem* charges against specific items and legitimate contract claims against the German former owners of such assets which may have been or may be made, and (ii) administrative charges and expenses.

(*b*) All assets, including any income earned thereon, that are to be made available to Canada under Article 14 of the Treaty of Peace with Japan less (i) any payments of *in rem* charges against specific items and legitimate contract claims against the Japanese former owners of such assets which may have been or may be made, and (ii) administrative charges and expenses.

Such reparations and assets should be transferred, after liquidation where necessary, to an account to be established in the Consolidated Revenue Fund to be known as the War Claims Fund, and should be available for the satisfaction of admissible war claims subject to the priorities suggested below, to the extent of the Fund but only if, and to the extent that, satisfaction is not otherwise provided for. Where assets have already been liquidated and the proceeds thereof invested in securities, these should be transferred to the Receiver General to be held for the purposes of the War Claims Fund.

The explanation given above of the two sources of moneys which I am recommending for the War Claims Fund fully points out the fact that the amount which will finally be available cannot by any means be determined now. This fact, however, should not prevent or delay the establishment of the Fund. After due consideration of the various factors involved, including particularly the adjustment factors relating to the assets held by the Custodian, I further recommend:

(*a*) that the War Claims Fund be established and that there be transferred into it immediately:

(1) $5,000,000 in Dominion of Canada bonds by the Custodian in respect of German enemy assets vested in him;

(2) $3,000,000 consisting of $2,680,000 in Dominion of Canada bonds and $320,000 in cash by the Custodian in respect of Japanese enemy assets vested in him; and

(3) the proceeds of the liquidation of any other German enemy assets already received by the Government of Canada through IARA.

(*b*) that the Custodian transfer at the end of each calendar year beginning with the year 1952 such additional proceeds of the liquidation of German and Japanese assets as the Government considers may be transferred; and

(*c*) that additional proceeds of liquidation of German assets received through IARA be paid into the Fund from time to time as they become available.

In this way a Fund of approximately $9,730,000 would be immediately available.

Instances of Satisfaction Otherwise Provided For

In some cases arrangements have been made by the Canadian Government or by foreign agencies permitting a Canadian claimant to recover compensation for his war losses. In nearly all cases these arrangements apply only to loss of or damage to property; in most cases only limited compensation is recoverable; and in two cases the recovery of even limited compensation has become unenforceable. Mainly these arrangements have been made in treaties of peace with ex-enemy countries, or in what are termed equal treatment agreements on war damage compensation concluded with Allied countries, or by foreign governments through the agency of War Damage Commissions. Each one of these instances of satisfaction otherwise provided for deserves special mention. In passing it may here be noted that Canada and Bulgaria were not at war with one another, so Canada was not a signatory to the Treaty of Peace with Bulgaria, that with Germany it has been impossible to conclude a treaty of peace, and that several countries, such as Greece, Poland and Indonesia, have been unable to make effective provisions for war damage compensation for their own nationals let alone for foreigners. Some cases have come to light where Canadians are barred from recovery for war damage compensation owing to lack of residence qualifications.

1. Italy

The main claims provisions of interest to Canadians are to be found in Article 78 of the Treaty of Peace with Italy. In order to qualify for compensation a claimant must be a United Nations national as defined in paragraph 9(*a*), that is to say he must have been a national of one of the United Nations both on September 3, 1943, which was the date of the armistice, and on September 15, 1947, which was the date of the ratification of the treaty, or he must have been treated as enemy under the laws in force in Italy during the war. The term "United Nations nationals" includes not only individuals, but also corporations or associations organized under the laws of any of the United Nations. Owner, as defined, includes a successor to the owner, provided the successor was also a United Nations national. A transferor of property retains his right to compensation without prejudice to obligations between the transferor and the purchaser under domestic law. Property is very widely defined. Shareholder claims by United Nations nationals in respect of damage to Italian war-damaged corporations or associations are expressly permitted, even although the holding is indirect and a minority one.

Provision is made for the restoration to the claimant of property in Italy and, where it cannot be returned, or where the claimant, as a result of the war, has suffered a loss by reason of injury or damage to property in Italy, for compensation by the Italian Government in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. Thus the claimant is safeguarded against loss in the purchasing power of the lira. Compensation is not to be subject to any form of levy or taxation, but is subject to foreign exchange control. Compensation may also be claimed in respect of loss or damage due to special measures applied to the property of a United Nations national during the war and which were not applicable to Italian property. All reasonable expenses incurred in Italy in establishing claims, including the assessment of loss or damage, are to be borne by the Italian Government. Another important provision makes these compensation provisions the liability of the Italian Government, where the loss or damage was sustained in ceded territory or in the Free Territory of Trieste. The settlement of disputes arising out of Article 78 is dealt with in Article 83, which provides for reference to a Conciliation Commission.

On September 20, 1951, the Canadian and Italian Governments made an agreement, which has still to be ratified by the Italian Parliament, concerning claims under Article 78, Canadian pre-war debt claims and seized Italian property in Canada. Under this agreement provision is made for the payment of the pre-war debts and the return of Italian property, while the Italian Government will pay to the Canadian Government the sum of 290 million lire in full satisfaction by the Italian Government of some of the Article 78 claims, the remainder to be settled in accordance with the treaty provisions.

At the time of writing no Canadian claims under Article 78 have been settled; neither have any cases as yet been submitted for conciliation.

2. Hungary

Mutatis mutandis the claims provisions in the Treaty of Peace with Hungary are identical with those of Article 78 of the Italian treaty. In the Treaty of Peace with Hungary the relevant Article is 26, compensation being two-thirds of the amount of loss or damage in forints. The Hungarian Government is made liable for loss of or damage to property in Northern Transylvania occurring while that territory was under Hungarian control. The armistice with Hungary was signed on January 20, 1945, and the treaty was ratified on September 19, 1947. The settlement of disputes arising out of claims under Article 26 is provided for by Article 35, which is not dissimilar from Article 83 of the Italian treaty.

A considerable number of Canadian claims have been presented to the Hungarian Government through the British Legation in Budapest, but the Hungarian Government has ignored these and similar Allied claims, and it would seem that the treaty procedure for dealing with claims under Article 26 is not operative.

However, Article 29, paragraph 1, reads as follows:

> "Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property, rights and interests which at the coming into force of the present Treaty are within its territory and belong to Hungary or to Hungarian nationals, and to apply such property or the proceeds thereof to such purposes as it may desire within the limits of its claims and those of its nationals against Hungary or Hungarian nationals, including debts, other than claims fully satisfied under other Articles of the present Treaty. All Hungarian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned."

Paragraph 5 of Article 29 excludes from any such liquidation certain types of property such as diplomatic or consular property.

The Canadian Government may desire to make use of Article 29 in order to provide some measure of limited compensation for Canadian claimants with unsatisfied claims under Article 26. The Custodian has in his hands approximately $275,000 of funds of Hungarian origin and certain income which has accrued on these assets.

3. Roumania

In the Treaty of Peace with Roumania there are articles similar in effect to those mentioned above as being in the treaty with Hungary. Article 24 (Roumanian treaty) is comparable with Article 26 (Hungarian treaty), Article 27 (Roumanian treaty) is comparable with Article 29 (Hungarian treaty), and Article 32 (Roumanian treaty) is comparable with Article 35 (Hungarian treaty). The armistice with Roumania was signed on September 12, 1944, and the treaty was ratified on September 19, 1947. Canadian claims under Article 24 (Roumanian treaty) have been presented to the Roumanian Government through the British Legation in Bucharest. They have been ignored by that Government and it would seem that the treaty procedure provided by Article 32 (Roumanian treaty) for dealing with claims is not operative. However, under Article 27 (Roumanian treaty) funds of Roumanian origin in the hands of the Canadian Custodian seized during World War II may be applied to the satisfaction of all Canadian claims not satisfied under other articles of the Roumanian treaty. The Custodian has approximately $300,000 of such funds exclusive of certain income which has accrued on these funds.

4. Finland

The claims provisions in Article 25 of the Treaty of Peace with Finland are similar to those of Article 78 of the Italian treaty. As there is no record of any such Canadian claims against the Finnish Government this matter need no longer be considered, but if such a claim should arise the treaty provides a means by which the claim may be wholly or partially satisfied otherwise than out of the War Claims Fund. There is no provision of this treaty under which any assets of Finnish origin which may be in Canada may be applied to the satisfaction of claims.

5. Thailand

On January 1, 1946, the United Kingdom and India entered into an agreement with Siam under which Siam agreed to compensate for certain losses and damage sustained by British subjects. Canada was not a party to this agreement not having been at war with Siam. In 1950 the United Kingdom on their own behalf and on behalf of certain other Commonwealth countries including Canada made a lump sum settlement with Thailand under which the United Kingdom Government received £5,224,220 out of which some payments have been made to Canadian claimants. Some payments have also been made to Canadian claimants directly by the Thai Government.

6. Japan

As indicated above, a law known as the Allied Powers Property Compensation Law has now received legislative approval in Japan. Reference to this law is made in Article 15(a) of the Treaty of Peace with Japan. This law, if and when it comes into force, will be of importance to Canadian claimants whose property in Japan sustained damage as a result of the war. The law is too detailed to call for more than an examination of its main features in this report. In essence it is very similar to Article 78 of the Italian treaty but an important

difference is that compensation is to be at the rate of one hundred per cent in the local currency and not at the rate of only two-thirds as in the Italian treaty. Compensation may be claimed in respect of losses sustained in Honshu, Hokkaido, Shikoku, Kyushu and other territory over which the sovereignty of Japan is restored by virtue of the peace treaty. Compensation may be claimed for damage caused by acts of hostility, for damage caused by the wartime special measures or other measures of the Japanese Government and its agencies, for damage on account of lack of due care on the part of the administrator or possessor of the property concerned, for damage suffered owing to the inability of an Allied national to have the property insured in Japan on account of the war and for damage suffered while in use of the Occupation Forces owing to lack of due care on their part or the inability of an Allied national to insure property. Compensation may be claimed for damage to the following: tangible property, use and lease of immovable property, debts, public loans, patents, trade marks and Allied shareholding interests in Japanese corporations. The claim of a Canadian claimant must be filed in writing by him through the Canadian Government within eighteen months from the time of coming into force of the peace treaty between Canada and Japan. In default of filing of the claim within the stipulated period of time, the claimant is to be regarded as having waived the claim for payment of compensation. Provision is made for the settlement of disputes arising in regard to a particular claim or claims.

7. France

As a result of an exchange of Notes in May, 1947, between the Canadian and French Governments the benefits of the French law on war damage compensation were given to Canadians, provided that the claim was filed with the competent French authorities not later than June 30, 1948. The basic French law providing compensation for war damage to property in France is Law No. 46-2389 of October 28, 1946. According to this law certain losses of immovable or moveable property caused by acts of war give rise to claims for compensation. Orders of priority among different classes of claimants are laid down. A corporation is excluded if either at least half of the directors were foreign nationals on September 1, 1939, or at time of loss, or if at least half of the capital was owned by foreign nationals on September 1, 1939, or at time of loss. Compensation paid is not freely usable in France but only in accordance with regulations laid down by the French authorities. The claims are dealt with by the appropriate departmental offices of the Ministry of Reconstruction and Town Planning and appeals from their decisions are allowed. A claimant could file his claim personally or through an agent. Claims were submitted by or on behalf of Canadian claimants through the Canadian Embassy in Paris, any further correspondence taking place between the claimant himself and the French authorities. While a considerable number of claims have been made by Canadians under this law, in very few cases have notifications of settlements been received by the Canadian Government. It is believed that the scale of war damage in France, as well as budgetary difficulties, have been contributory factors in delaying settlements.

8. The Netherlands

As a result of a decree of the Minister of Finance of September 10, 1947, the benefits of the Netherlands law on compensation for war damage were extended to persons, natural or juridical, who were Canadian at time of loss. Claims had to be filed with the War Damage Commission at The Hague not later than March 1, 1948. The basic decree on war damage compensation was passed on November 9, 1945. This decree is comprehensive in scope but claims will not be entertained in respect of money or securities or losses such as those of rents or profits. Very few Canadians are affected by the decree.

An organization which should be mentioned is the former German Custodian of Enemy Property in the Netherlands, known as the Deutsche Revisions- und Treuhand A.G. This organization seized a considerable amount of enemy property, including banking accounts owned by Canadians and other Allied nationals. After the war the Deutsche Revisions-und Treuhand A.G. was itself put into liquidation by the Netherlands authorities, who have been able to pay a fairly substantial dividend to Allied creditors.

9. Belgium

As a result of an exchange of Notes in March, 1950, between the Canadian and Belgian Governments the benefits of the Belgian law on war damage compensation were given to persons, natural or juridical, who were Canadian at time of loss. Claims had to be filed with the appropriate Belgian authorities not later than June 2, 1950. The basic law on war damage compensation was passed on October 1, 1947.

As in other cases the regulations are most detailed and it is too early to give any indication as to progress made in settlement of Canadian claims.

10. United Kingdom

The United Kingdom Government has had in operation for ten years a very comprehensive scheme for war damage compensation, operated by the War Damage Commission, from which Canadian owners of property in the United Kingdom can benefit.

Under certain circumstances it would be possible for a Canadian to obtain limited compensation from the United Kingdom Government under the Extended Far Eastern Private Chattels Scheme (War Damage) for war losses in the Far East.

11. Philippine Islands

The Philippine War Damage Commission was created after the war. The funds administered by it were voted by the United States Congress. Although the benefits of the law governing the Commission's activities were extended to Canadians the results have been disappointing, mainly, it seems, because of strict residence requirements. The Commission no longer exists. A very small number of Canadian claimants succeeded in receiving some payments which, however, bore little relation to the extent of their losses.

12. Malaya

The Malayan War Damage Claims Commission, with headquarters in Kuala Lumpur, came into existence in 1946, the funds for compensation being provided in the main by the United Kingdom Government. The activities of the Commission are of some interest as a considerable number of Canadians lost property in Malaya as a result of the war. Compensation may be claimed in respect of damage caused by acts of hostilities, measures taken under proper authority for the purpose of denying or diminishing the use of property to the enemy, measures taken under proper authority for military, naval or air training purposes or seizures or destruction by enemy forces or individual enemy subjects whether acting under authority or not. Compensation may be claimed for damage to land, buildings, business equipment, growing crops, livestock and private chattels, but not for loss of life, personal injury and loss of health, money, securities and documents generally, or what is termed consequential loss, such as loss of profits, rentals, income, goodwill or shareholdings in commercial undertakings.

Most, if not all, Canadian claimants have now received an initial payment of S.S. $350 regardless of the amount by which the claim exceeds this amount. It is presumed that further sums will be paid eventually, but when it cannot be said. The Commission is handling a very great number of claims.

13. North Borneo, Sarawak and Brunei

The War Damage Claims Commission for these territories, with headquarters at Jesselton, North Borneo, was established in 1947 at the instance of the United Kingdom Government. Awards are either "Restoration awards" or "Outright awards", the former being conditional upon the work of restoration being carried out and the latter, in general, applying only to stock-in-trade, produce in store, livestock or private chattels, and being conditional upon applicants continuing local residence unless undue hardship would be caused by insistence on such a condition. One Canadian claimant, although no longer resident in the territories, has received a very small payment.

14. *S.S. Athenia*

The United Kingdom Government has made payments to most, if not all, Canadians who lost personal belongings when this ship was sunk. The payments were only in respect of property losses and on an "ex-gratia " basis. The payments varied from about 25% to 100% of the amounts claimed, the higher percentages being paid in respect of the smaller claims. Altogether about $150,000 has been so paid to Canadians.

15. Compensation by Canadian Government for Death of Government Employees

The Canadian Government has in certain cases compensated claimants for losses resulting from the death of civilians killed while on Government business.

Incidentally, if the compensation has in any case been by way of pension, capitalization of the pension will be necessary for ascertaining the extent to which satisfaction of a claim which might otherwise be made against the War Claims Fund is otherwise provided for.

16. Interim Compensation for Property Losses

In a number of cases the Canadian Government has paid interim compensation to civilians for property losses. These are cases where Government servants lost personal belongings or household effects as a result of the war.

17. Interim Compensation for Losses Caused by Death or Personal Injuries Not Paid Out of the War Claims Fund

The Canadian Government is establishing a scheme for the interim compensation of such losses to a limited extent in hardship cases. While the Government will reimburse itself out of the War Claims Fund, interim compensation payments, made before the Fund is established will constitute satisfaction, in whole or in part, otherwise provided for. The same will be true of those made after the Fund is established, if they are not made out of the Fund.

18. Shareholders and Corporations

There may be cases where, under the rules established for the admissibility of claims against the War Claims Fund and provisions made for satisfaction from other sources, a corporation or a shareholder (either in that corporation or in a parent of it) might, in the absence of safeguards against duplication of satisfaction, make a claim against the War Claims Fund which will have

been or will be wholly or partially satisfied from another source. If, for example, corporation A has the status of a claimant under the Italian treaty while a shareholder in corporation A has not such status, but such shareholder has the status of a claimant against the War Claims Fund while corporation A has not, the shareholder is provided with a source of satisfaction other than the War Claims Fund because a corporation must be deemed to claim on behalf of its shareholders. Similarly, if a shareholder in corporation B has a claim under the Italian treaty while corporation B has not, but corporation B has a claim against the War Claims Fund which the shareholder has not, a source of partial satisfaction of corporation B's claim is provided because of the provision made for payment under the Italian treaty to its shareholder.

Extent and Operation of Principle

The instances of satisfaction otherwise provided for have been set out in some detail because in my opinion the general principle should be that claims should not be admitted against the War Claims Fund to the extent that the claimant either has been paid or is likely to obtain payment from another source, with this proviso, that if the claimant by reason of his own neglect or default has failed to receive or has forfeited or lost his eligibility to receive payment from another source he should be deemed to have received payment. This proviso may be difficult to apply but if a claimant knew or should have known that he would lose his entitlement to compensation if he did not apply within a certain time within which it would have been reasonable to expect him to apply his failure to do so should be regarded as neglect or default. Where it is alleged by a claimant that his compensation from outside sources is not or will not be complete, it may be necessary for his whole claim to be adjudicated with a debit to him of the amount which he has received or is likely to receive from sources other than the Fund, this amount being deducted from the amount that he would otherwise be entitled to be paid out of the Fund. The general principle to which I have referred is of general application and it may very well be that the foregoing list of instances of satisfaction otherwise provided for is not exhaustive. However, I do not think that war risk insurance moneys received by the claimant, although they must be deducted from the value of the property insured and lost in determining the amount of the loss, should be treated as satisfaction otherwise provided for, nor should other insurance moneys where they are taken into account in determining the amount of compensation. The selection of one way of treating them rather than the other may have importance in the application of the priorities recommended below.

As will be seen, my recommendation will be that each claim be dealt with by a Commissioner. It will be the duty of this Commissioner to decide whether and to what extent the claimant has been or likely will be compensated from other sources and recommend accordingly.

Cases may arise where it is uncertain whether any or further compensation will be available from another source. Take, for example, Malaya. If, upon inquiry about a particular claim, the Commissioner cannot find out from the Malayan War Damage Claims Commission whether any payments, or any further payments, will be made by that Commission on that claim, he will not be able to appraise with any confidence the claimant's chances of recovery from that source. It seems to me that in cases where recovery is not reasonably certain the Commissioner should proceed as follows: (a) if, in his opinion, the balance of probabilities is in favour of recovery he should defer his recommendation until recovery or until the prospects as to recovery become reasonably

certain, and (b) if, in his opinion, the balance of probabilities is against recovery he should recommend as if there would be no recovery on condition that the claimant assign his rights to any amounts recovered to the Crown in the right of Canada, or if future rights cannot be validly assigned that he undertake to do all things necessary to vest such amounts and his rights thereto in the Crown. In cases where recovery is reasonably certain the Commissioner should regard satisfaction as otherwise provided for, wholly or *pro tanto,* and decide accordingly. I may add that my expectation would be that in nearly all cases there would be reasonable certainty as to recoverability from sources outside the Fund before the Commissioner would normally adjudicate.

It will be apparent that a foreign country which has or will have a fund for distribution among its nationals having war claims but has not already made the distribution may, by adopting a provision similar to that recommended above —namely, that no payment will be made if satisfaction is otherwise provided for —be able, if the foregoing recommendation had no exception, to throw a burden on the Canadian Fund which it should not justly bear. For example, take a Canadian corporation which qualifies as a claimant against the Canadian Fund, but only to the extent that satisfaction of its shareholders is not otherwise provided for. Many of its shareholders are, let us say, nationals of a foreign country and would qualify for satisfaction there but for the adoption of a provision there such as I mentioned. But the adoption of such a provision by the foreign country would throw the whole burden of satisfying the corporation's claim and that of its shareholders on the Canadian Fund. Or let us say that A qualifies as a claimant against the Canadian Fund to the extent that satisfaction of his claim is not otherwise provided for and, but for the adoption of such a provision abroad, would also qualify as a claimant against the foreign fund. The adoption of such a provision by the foreign country would throw the burden of satisfying A's claim on the Canadian Fund. It seems to me that such provisions, if any are made with respect to foreign funds, should be disregarded in determining whether satisfaction is otherwise provided, but that where such a provision exists the Canadian Government should stand ready in respect of any claim or claims to agree with the authorities of the foreign country on a fair division of the burden. Ordinarily, of course, it would be just as unfair for Canada to attempt to throw the full burden on the foreign country's fund as for the foreign country to attempt to throw the full burden on Canada's Fund. There is, however, no unfairness in expecting countries where, or on whose ships, the loss or damage took place to assume the primary responsibility for compensating such losses.

Pooling

The next question that arises is whether all moneys in the War Claims Fund, whether derived from German sources or Japanese sources, should be pooled for payment of Canadian war claims regardless of where the losses took place or by whom they were caused, without relating the amount payable on the claim for any particular loss to the funds obtained from any particular national source, and without limiting the amount available for payment of claims for losses arising in a particular area or from the acts of a particular government or its agencies to the funds derived from some particular national source; that is, to assets of German origin or to assets of Japanese origin. For convenience of reference this will be referred to as pooling. My recommendation is that all the funds and assets in the War Claims Fund, no matter from what source derived, be pooled and that all war claims admissible for compensation be eligible for payment out of the Fund just as if Canada had been at war

with only one power and all the losses had taken place in the territory of and had been caused by that power. This recommendation is made for the following reasons:

1. The war was a world war and losses inflicted on Canadians by any enemy power in any part of the world were inflicted for the direct or indirect benefit of all enemy powers.

2. If the principle were adopted that the assets derived from any particular nation or its nationals should be applied only to the losses caused by or in that nation or in areas occupied by that nation there is no good reason why the German assets should not be applied only to meeting losses caused by or in Germany or in German-occupied areas, and the Japanese assets applied only to the losses caused by or in Japan or in Japanese-occupied areas. The result would be great inequality in the treatment of claimants. If, for example, Hungary alone were responsible for losses in areas in Hungary while not occupied by the German forces claimants for such losses would receive very little or no compensation because there are no Hungarian assets available for contribution to the Fund—and the amount recoverable under the Hungarian treaty would at best be extremely limited because of the gross disparity between Hungarian assets in Canada and the treaty claims against them. But Canadian claimants for losses in Roumania would receive large dividends owing to the fact that there is not the same disparity between Roumanian assets in Canada and claims. Similar examples with reference to other countries could be given. Moreover, if only Japanese assets were available for satisfying claims for losses in the Far East and the claims for compensation for deaths, personal injuries and maltreatment attained large proportions there might be very little left for satisfaction of claims for property losses there while claimants for property losses in Germany might be fully compensated.

3. The prime aggressors in World War II were Germany and Japan and more than any other countries they were responsible for the losses wherever they took place. It is, of course, impossible to apportion the responsibility between them and it seems only fair that the assets obtained from them should be pooled for meeting these losses.

4. In many cases it is impossible to ascertain which enemy state caused the loss and in other cases it is impossible to determine whether the loss was caused by enemies or allies, or by enemies or Candians, as in cases of mines, artillery fire and air raids. Losses from looting and losses on the high seas present similar difficulties.

It may be added that examination of Article 6A of the Final Act of the Paris Conference on Reparation and Article 14 of the Treaty of Peace with Japan indicates that the German assets and the Japanese assets may be pooled if the Canadian Government thinks fit. In saying this, I am assuming that the Treaty of Peace with Japan will be ratified.

The next question to be dealt with is as to what war claims should be treated as admissible for compensation.

Claims "Arising Out of World War II"

The term "World War II" is a loose one used as a general description to cover the group of wars between all the countries ultimately involved during the period following September 1, 1939, when Germany invaded Poland. As regards Canada, it is a general term designating the group of wars in which Canada was a belligerent in the period following early September, 1939, and ending with the surrender of Japan in September, 1945. In one sense any

demand for compensation alleged to be just for losses or injuries alleged to have been caused by World War II is a claim arising out of World War II but many of these demands can be dismissed at once as not really arising out of World War II and, therefore, as not being war claims within the meaning of the terms of reference. The classes of claims that can be so dismissed are the following:

1. **Claims where the act complained of as causing the injury or loss took place either before or after certain dates:**

The act complained of, if it took place outside the Far Eastern theatre of war, should, in my opinion, not be regarded as giving rise to a claim arising out of World War II unless it occurred between September 1, 1939, and May 8, 1945, inclusive. Incidentally, if it did occur during this period and resulted in injury or loss of a compensable kind and was of such a character that a war claim for compensation for that injury or loss may, by the rules set out below, be based upon it, the claim should be considered a valid claim arising out of World War II. If the act complained of took place within the Far Eastern theatre of war the comparable dates should be December 7, 1941, and September 2, 1945, except that if it is established that an act complained of although occurring in the Far Eastern theatre of war occurred on the high seas in the course of the war between Canada and her Allies and Germany and her European Allies, the relevant dates should be September 1, 1939, and May 8, 1945. It was after September 1, 1939, that the *S.S. Athenia* was sunk, and although the sinking took place before Canada declared war, it was followed so closely by Canada's declaration of war that the resulting losses to and injuries of Canadians should be regarded as arising out of warfare in World War II between Canada and Germany. The reason for the selection of the dates is obvious: December 7, 1941, was the date of the bombing of Pearl Harbour, May 8, 1945, was the date of the surrender of Germany, and September 2, 1945, was the date of the surrender of Japan.

2. **Claims which arose out of any of the following wars:**

(*a*) the Sino-Japanese War, from July 7, 1937, to December 6, 1941.

Canada was a neutral in this conflict and claims by Canadians for losses in this war clearly did not arise out of World War II.

(*b*) the Russian-Finnish War of 1939-1940.

This again was a war in which Canada was a neutral.

(*c*) civil wars, for example, the civil war in Greece which began in 1944 and those in Indonesia, Indo-China and Palestine.

With regard to the wars above mentioned it may be said generally that the Government of Canada could not reasonably be expected to compensate its nationals for losses arising from wars in which Canada was a neutral out of funds obtained as a result of another war even though (as in the case of Japan, though not in the case of Finland) the funds later obtained may have been obtained from one of the parties to the earlier conflict.

3. **Claims which come within any of the following classes:**

(*a*) Claims arising out of pre-war confiscatory measures.

Some claims of this kind have been filed by persons whose property was confiscated or made subject to penal taxation for racial reasons and who emigrated to Canada. All or most of the losses took place in Germany, Austria, Czechoslovakia, and the Memel Territory. In many cases the property was restored after the war, but in some areas subject to Communist control re-confiscation through nationalization is said to have taken place. Clearly

claims for compensation for losses caused by pre-war acts did not arise out of the war. And, neither, as will be seen below, can a claim for compensation for nationalization be said to arise out of the war.

(*b*) Claims arising out of pre-war contracts and obligations.

While it would seem to be obvious that these did not arise out of the war, the distinction between them and war claims is not always obvious to claimants. The distinction is made clear in Article 2 of the Final Act of the Paris Conference on Reparation of 1945, Article 18 of the Treaty of Peace with Japan, Article 81 of the Treaty of Peace with Italy and similar articles in the other treaties of peace.

The main types of claims arising out of pre-war contracts and obligations which have been received are the following:

(i) Standstill Agreement Claims. These are claims against German banks in U.S. dollars or sterling, suspended by the moratorium granted to German banks some twenty years ago.

(ii) Bond Claims. The largest claims are by the holders of U.S. dollar or sterling bonds issued or guaranteed by the German Government in connection with the Dawes Loan, 1924, and the Young Loan, 1930. Other bondholders claim in respect of German municipal, banking or industrial bonds, many of which were guaranteed by the former German Government. Large amounts have also been claimed in respect of German indebtedness payable in local currency, such as claims on the Mark bonds which have been worthless since 1923. Smaller sums have also been claimed in respect of Japan's indebtedness payable either in U.S. dollars or sterling or in local currency.

(iii) Commercial Credits. Many claims have been received from corporations, merchants and traders for amounts due them as the result of commercial transactions entered into before the war and which they have not been able to collect because of the insolvency or disappearance of the debtor or for some similar reason. Claimants allege that these losses have arisen out of the war. However, apart from the fact that the debts may still exist and the creditors have had their remedies against their debtors for what they were worth, the claims should not be regarded as arising out of the war because as will be seen later a distinction must be drawn between losses caused by the existence of a state of war and those caused by operations of war, the latter only being compensable, and the losses of these creditors can in no sense be said to be the direct consequence of any act of war. Moreover, the debts may have turned out to be uncollectable for any one of many reasons so that in many if not all cases it could never be proved that the loss was caused even by the existence of a state of war.

(*c*) Claims arising out of inflation or depreciation in the exchange value of currency.

The claimants here were owners of currency or obligations payable to them in currency which has wholly or partially lost its value, for example the Hungarian pengo, the Chinese dollar, the Japanese yen or the Italian lira. This loss in value if it had its origin in the war at all was caused by the existence of a general state of war rather than by operations of war, which cannot be said to have directly caused the loss in value in any sense comparable to that in which it may be said that war operations damaged or destroyed physical assets. Inflation or depreciation losses during the war visited whole populations in all countries and to admit them as losses arising out of the war—at least with a view to compensation—would open the War Claims Fund to claims from all Canadians. Again, conceivably the same losses might have been incurred had there been no

war at all but the nations generally had by huge expenditures been put in a very advanced stage of preparedness for war. Assessment of losses from currency inflation or depreciation would be impossible as the extent of the inflation or depreciation which would have taken place had there been no war is unknown. I am of opinion that it would be both impracticable and unjust to treat such losses as arising out of World War II.

(*d*) Claims arising out of foreign exchange control legislation abroad.

The claims are by persons who say they "cannot get their money out", but in most cases it is improbable that they could have done so had there been no war. These claims cannot be said to arise even from the existence of a state of war, let alone war operations.

(*e*) Claims arising out of nationalization.

In this class are included all types of claims for compensation for property of which the claimants were divested by industrial nationalization, land reform and redistribution of property. The total losses of Canadians on this account run into hundreds of millions of dollars, or several times the total of all known war claims. In most, if not all cases, nationalization took place in the period following upon the close of hostilities and claims of this nature, therefore, cannot be considered to be war claims arising out of World War II. If nationalization in any case took place during World War II a claim arising for resulting losses should still not be regarded as a claim arising out of that war because nationalization was a general measure of economic policy affecting enemies and non-enemies alike and, therefore, in no sense an operation of war.

Claims "By Canadians"

The terms of reference require me to consider claims "by Canadians". There are two separate questions involved, namely:

1. At what time or times must the claimant have been a Canadian?
2. Who is to be considered a Canadian?

The first question arises in this way. The simplest type of claim is that put forward by a person who, whatever meaning is given to the word "Canadian", was a Canadian at the time of the outbreak of war, at the time of the act complained of, at the time of the loss or injury, at the time he filed his claim, and is a Canadian at the time any award of compensation is made to him. On the other hand, there may be claims filed by persons who were not Canadians at the time of the outbreak of war, or at the time the loss occurred, but have since become Canadians. There may be claims by persons who were Canadians at the outbreak of war and at the time the loss occurred, but who have since ceased to be Canadians. It is necessary, therefore, to consider the time that is relevant for the purpose of determining whether the claim is a claim "by a Canadian". In this respect, the use of the word "claim" is somewhat misleading. A claim, by dictionary meaning, is merely a "demand", and, therefore, if the terms of reference were interpreted literally, the only question would be whether, at the time the demand for payment was filed, the claimant was a Canadian. This, however, would be to place a procedural interpretation on the subject matter of the terms of reference rather than to deal with the substantial question. The substantial question is, what losses of Canadians are to be compensated. In my view, therefore, the time when a person must have been a Canadian was at the time of loss, but loss in this context, though not for certain other purposes later mentioned in the report, should be taken substantially as meaning the time when the act took place which caused the loss. This meaning will, however, be more precisely explained a little later.

As a great many claims have been received from persons who were not Canadians at the time of loss it is necessary briefly to consider the justification of a requirement that a claimant must have been a Canadian at that time. The requirement is based upon the assumption that nationality rather than domicile or residence (subject to what is said below about corporations, and subject to the extent to which the domicile of an individual is an element in his nationality) should be the test of whether a person should for claim purposes be regarded as a Canadian. That this should be the test is in accordance with past practice and is justifiable in principle. Nationality is a person's political status which binds him by the tie of national allegiance to some sovereign or country. In the distribution of reparations the Government in considering the claims of natural persons against a reparations fund naturally and justly considers that those who were bound to that country by the tie of national allegiance at the times they suffered the losses for which they seek compensation (provided they are still so bound) are the ones who have moral claims to shares of the fund. The United Kingdom Government after World War I appointed a Royal Commission on Compensation for Suffering and Damage by Enemy Action (to be referred to as the Sumner Commission) "to consider cases in which there is a moral claim by *British Nationals* . . . for compensation for sufferings or damage arising out of the action of the enemy during the War." The Commissioners appointed in Canada after World War I to consider claims against the Reparations Fund rejected several claims on the ground that the claimants were not Canadian nationals or British subjects at the time of the loss for which they claimed compensation. Nationality is also the basis of claims under the Italian treaty and under the Japanese treaty. Moreover, the United States War Claims Commission in their report of March 31, 1950, recommended the adoption of the same principle and considered that the position taken in that respect was in accordance with past practice and amply justified by reference to the authorities. (p. 6).

The first nationality requirement should, therefore, be that the claimant must have been a Canadian at the time of loss, the words "time of loss" in this context to mean:

(*a*) where the claim is for compensation for loss resulting from the death of another person, the time of the inflicting of the injury which caused the death (injury by maltreatment to be deemed to have been inflicted at the beginning of the maltreatment);

(*b*) where the claim is for compensation for personal injury the time when the injury was inflicted (injury by maltreatment to be deemed to have been inflicted at the beginning of the maltreatment);

(*c*) where the claim is for compensation for maltreatment *per se* the beginning of the maltreatment;

(*d*) where the claim is for compensation for loss of or damage to property the time of the act which resulted in the loss or damage.

There should, however, in my opinion, be a second nationality requirement: namely, that the claimant if an individual should be a Canadian citizen and if a corporation should be a Canadian at the time of the presentation of his or its claim for adjudication. The propriety of this requirement would appear to follow from a reasonable interpretation of the terms of reference. Moreover, the general rule applicable to claims for damages made by one state against another state for injuries or losses sustained by the nationals of the claimant state, apart from specific provisions in conventions or treaties, is "that the claim must be continuously national; i.e. owned by a national of the claimant state from the date of the original injury to the date of the presentation of the claim." (Whiteman on Damages in International Law, Vol. 1, p. 109). Whiteman goes on to say that "presentation" is generally interpreted by arbitral tribunals

to mean the date of presenting the claim to the tribunal or of filing the memorial. The question as to when a claimant should be deemed to have presented his claim for adjudication may raise some difficulty. Claims of varying degrees of completeness or regularity have been filed with the Government during the past twelve years. With regard to every claim that has been made or will have been made before the appointment of a Commissioner having power to adjudicate the claim, the date of the appointment of the Commissioner should, in my opinion, be taken as the date of presentation of the claim for adjudication. Where a claim is first made after that date the date when the Commissioner receives notice of the claim should be taken as the date of presentation.

While the nationality of an executor or administrator claiming on behalf of an estate should at all times be regarded as immaterial, no awards should be made for the benefit of any beneficiary of an estate who was not a Canadian citizen at time of presentation unless the deceased was alive at time of presentation and was a Canadian citizen at that time, in which event the nationality of beneficiaries should be regarded as immaterial. This recommendation follows as nearly as may be the general practice of arbitral tribunals in claims of state against state. (Borchard on Diplomatic Protection of Citizens Abroad, p. 628 and following). Beneficiaries in this connection should include dependents claiming maltreatment awards.

The term "Canadian citizen" as used above presents no difficulty of interpretation as it is defined in the Canadian Citizenship Act which came into force on January 1, 1947. The term "Canadian" as applied to individuals must be defined because the time of loss in most, if not all, cases was before the Canadian Citizenship Act was passed. Before the passage of this Act several statutes had been enacted dealing with the status of Canadians for various purposes with varying definitions for each purpose. The Canadian Nationals Act (chapter 21 R.S.C., 1927) defined "Canadian nationals". This Act, however, had a very limited application and has been repealed. The Immigration Act defined "Canadian citizen" for the purpose of determining whether a person had a right to enter Canada or return to Canada as distinguished from the person who, having no right to enter or return, could be admitted only as an immigrant for temporary purposes. The Naturalization Act defined the term "British subject" for the purposes of Canadian law and provided a method by which the status of British subject could be secured by naturalization in Canada. The status of British subject was, however, held by persons throughout the British Commonwealth without any distinction between those who derived their status from Canada and those who derived it from other parts of the Commonwealth.

As we now have a Canadian Citizenship Act which expresses the view of Parliament as to what persons should be regarded and treated as Canadian citizens it would appear that for purposes of compensation for war claims the definition of a Canadian should follow as closely as possible the definition of a Canadian citizen as contained in the Canadian Citizenship Act. To this principle, however, there should, in my opinion, be one important exception. After World War I it seems to have been considered both by the authorities administering war claims in the United Kingdom and in Canada that for compensation purposes a person who at a relevant time was a British subject domiciled in Canada should be treated as a Canadian at that time. Indeed, I do not think it is too much to say that to the extent that the matter had been considered at all in this country before the enactment of the Canadian Citizenship Act it had been rather widely considered that British subjects domiciled in Canada should be regarded as Canadians. In any event the connection of such persons with Canada would appear to be closer than their connection with any other part of the British

Commonwealth, a fact which has considerable relevancy when claims for compensation for war losses are considered. I have, therefore, come to the conclusion that in defining a Canadian there should be added to the definition of Canadian citizen as contained in the Canadian Citizenship Act words including British subjects domiciled in Canada. My recommendation is that the definition of a Canadian as applied to individuals be as follows:

A Canadian means with respect to any relevant time a person

(i) who was born in Canada and had not become an alien at the relevant time; or

(ii) who was born outside of Canada and his father, or in the case of a person born out of wedlock, his mother,

(*a*) was born in Canada and had not become an alien at the time of that person's birth, or

(*b*) was, at the time of that person's birth, a British subject who had Canadian domicile,

if at the relevant time that person had not become an alien and had either been lawfully admitted to Canada for permanent residence or was a minor;

(iii) who was granted or whose name was included in a certificate of naturalization granted in Canada and that person had not become an alien at the relevant time;

(iv) who at the relevant time was a British subject who had Canadian domicile; or

(v) who being a woman other than a woman who comes within paragraph (iii) or (iv)

(*a*) before the relevant time was married to a man who at the time of the marriage possessed the qualifications set out in paragraphs (i) (ii) (iii) or (iv); and

(*b*) at the relevant time was a British subject and had been lawfully admitted to Canada for permanent residence; or

(vi) who at the relevant time was a British subject having a domicile in Canada.

Newfoundland should be deemed at all times to have been part of Canada.

It will be noted that the term "Canadian domicile" is used in the definition suggested above. This term should be defined as meaning Canadian domicile within the meaning of the Immigration Act. If any question arises in any adjudication by a Commissioner as to whether any person had Canadian domicile at any relevant time the question should be determined by the same authority and in a like manner as if it arose under the Immigration Act and the determination thereof in such manner should be final and conclusive for the purpose of the adjudication, as otherwise rulings by a Commissioner or Commissioners on a question of Canadian domicile might be made which would be inconsistent with prior or subsequent rulings of the Department of Citizenship and Immigration. When other questions of domicile arise in adjudications the ruling in each case should be made by the Commissioner making the adjudication and domicile in that case should mean domicile in accordance with the principles of the common law.

In addition to persons who qualify as Canadians under the definition suggested above there is another class of persons who, in my opinion, should be treated as Canadians for compensation purposes. These are alien members of the armed forces. If a person, whatever his nationality, enlisted and served in the army, navy, or air forces of Canada for active service in World War II and was honourably discharged therefrom he should be regarded as having been

a Canadian at all times between his enlistment and his discharge. He should, however, in my opinion, be required to be a Canadian citizen at time of presentation of his claim.

Notwithstanding the foregoing there may be some persons who would qualify as Canadians under the suggested definition who should not be eligible for compensation. These belong to the class of dual nationals. It is possible that some persons who at the relevant time were Canadians as defined above were at that time also nationals of another country. Dual nationality can arise in a number of ways. A person born in Canada of a Swiss father or a person born in Denmark of a Canadian father would be examples of two common types of dual nationality. At first glance it might seem that all Canadian dual nationals should be treated alike and that all should be treated in the same manner as other Canadians. But in certain cases I think that the domicile of a Canadian dual national should have a bearing upon his entitlement. The case of a Canadian dual national who is domiciled in the country of his second nationality requires special examination. There would appear to be no good reason why the Canadian Government should entertain a claim say from a Canadian-Portuguese dual national who was domiciled in Portugal at the time of loss. It would seem proper to deny such a claim and that to do so would be consistent with the view that domicile in Canada at time of loss should in certain cases be a determining factor in establishing Canadian nationality and thus, indirectly, entitlement, which is the view upon which certain parts of the definition of Canadian above recommended is based. It seems to me that while possession of dual nationality by a claimant should not in itself bar his claim, no consideration should be given to a claim from a Canadian who at time of loss possessed a second nationality and who was at that time domiciled in the country of his second nationality, subject, however, to this one exception, that the claim of such a Canadian upon whom loss or injury was inflicted by enemy authorities on account of his being a Canadian should be admitted to the extent, but only to the extent, of the loss or injury so inflicted.

It will be observed that the rules suggested for dual nationals apply to Canadians whose second nationality was that of an Allied country, a neutral country or an enemy country. Perhaps it would be useful to suggest some hypothetical examples of how these rules would work out in practice:

(*a*) Let us assume that a Canadian-Belgian dual national, domiciled in Belgium throughout the war, owned a ball-bearing factory in Germany which was destroyed during an Allied bombing raid. The claim from such a person should not be entertained. The natural source of his compensation, if any, should be regarded as either the Belgian Government or the German Government.

(*b*) Let us assume that a Canadian-German dual national was domiciled in Germany at the outbreak of war, that he insisted on being regarded as a Canadian by the German authorities and as a result was placed in an internment camp where severe maltreatment left him with a permanent disability, that at the time he was interned his personal property was seized by the German authorities and never returned to him, and that during the period of his internment his house was destroyed in an air-raid. Such a person should be awarded compensation out of the War Claims Fund for personal injuries arising from maltreatment, for the maltreatment itself, and for the loss of his personal property, but none from this Fund for the destruction of his house.

It may be unnecessary to add that the suggested rules for barring certain claims of dual nationals have reference only to dual nationality at the time of loss, and not to dual nationality at the time of presentation of the claim. The relevant question with reference to time of presentation is whether the

claimant was a Canadian citizen then, and all questions as to whether he was a national of another country or domiciled in another country at that time should be regarded as irrelevant.

There may be claimants who because they are dual nationals have received or are likely to receive compensation from other governments or authorities. In such cases the general rule that compensation should not be paid to the extent that it is otherwise provided for should be followed.

During the war persons who in addition to being Canadians also possessed an enemy nationality were faced with difficult problems arising from a conflict of loyalties and as a natural result there were some who chose to give collaboration, cooperation or assistance to an enemy. There is no need to formulate a special rule for this group because they would come within a general rule which I propose to recommend, and, for purposes of convenience, at this stage of the report.

This general rule is that where there was any voluntary collaboration or cooperation with or assistance to an enemy, in any part of its war effort, on the part of a claimant, whatever his nationality or nationalities, and whether individual or corporate, that claimant should be denied all participation in and should receive nothing out of the War Claims Fund. It may be unnecessary to add that in the case of the death of such a person where his claim, if good, would survive for the benefit of his estate, no compensation in respect of losses or injuries suffered by such a person should be paid to his heirs, executives, or administrators.

The foregoing definition of a Canadian obviously applies to "individuals" only, by which I mean persons other than corporations. The question as to what corporations should be treated as Canadians raises other questions. The reason for making nationality rather than domicile or residence, or something else, the governing test of eligibility of individual claimants does not apply to corporations. An individual's nationality binds him by the tie of national allegiance to some one sovereign or country but "the application of such ideas to a limited company is incongruous; allegiance and loyalty are personal by the nature of the case. An incorporated company cannot with propriety have such terms applied to it as if it were a mind subject to emotions or passions or a sense of duty." (Lord Shaw of Dunfermline in *Daimler Company Limited* v. *Continental Tyre and Rubber Company* (*Great Britain*) *Limited* [1916] 2 A.C., p. 329). Moreover, it is submitted that the unfairness of making incorporation or registration in Canada (the nationality test) the test of eligibility of a claimant when the attempt which is being made is to decide what claimants have moral claims is obvious. Reference has been made to the Sumner Commission, appointed by the United Kingdom Government after the First World War "to consider cases in which there is a moral claim by British Nationals . . . for compensation for sufferings or damage arising out of the action of the enemy during the War . . ." Despite the reference to "British Nationals" the Commission did not feel that it could fairly make British registration the test of a corporation's right to rank on the Fund. It said (p. 8 of final report): "The obligation to exclude aliens from ranking upon the Fund presents difficulty in dealing with claims by Corporations. It would be equally inadmissible to permit a company, whose management and shareholding were both foreign, to rank on the Fund in competition with British claimants, merely because of a British registration, and, conversely, where a company is British in capital and direction and has only been registered abroad for some legitimate and

technical reason, it would be inequitable to exclude it." The test the Commission applied was the test of control. I now quote the passage following that quoted above:

> "In such cases the Commission have acted on the test of control, which has been adopted in legal decisions as the best test of British character. Similarly, in accordance with the decided cases, the place where the mind and management of a company reside has been adopted as the important matter when the domicile of a company has to be found. When the Commission have had to deal with exceptional cases, they felt it right to have regard to what may justly be thought to fall within the intentions, which guided the provision of the Fund."

The reference in this passage to domicile appears to be to commercial domicile, that "anomalous species of domicil which springs into being during war" (Cheshire on Private International Law, 3rd Ed., p. 240) which invests its possessor with enemy character and which "is possessed by any person, even a British subject or a neutral, who is voluntarily and actually resident, or who carries on business, in the hostile country, or in territory effectively occupied by the enemy." (Ibid., p. 241). I do not think that much help is to be derived from the rules relating to commercial domicile when we seek for a test of eligibility of a corporate claimant against the War Claims Fund. However, I would adopt as one of the tests of eligibility of corporations the test of control in a somewhat different sense. It seems to me that in determining what corporate claimants should be recognized as Canadian claimants the first requirement should be that the central management and control should be in Canada; in other words, that the company (whether it is an income tax payer or not) be resident in Canada within the meaning of the term "resident" as used in the Income Tax Act. A company resides for the purpose of income tax where its real business is carried on and the real business is deemed to be carried on where the central management and control actually abide. This test should not be adopted because it is the income tax test but because of the vital bearing it has on the question of whether a corporation which does not carry on its real business in Canada can reasonably be regarded as Canadian. I am of opinion that it cannot.

But, residence should not be the only test. It seems to me that the corporation in addition to residing in Canada should, in order to be regarded as Canadian, be engaged in active trading activities in Canada, either itself or through one or more subsidiaries, that is, subsidiaries either wholly owned or controlled by it. If it is so engaged in trading activities in Canada, which I would define as business operations in Canada of an industrial, mining, commercial, public utility, or public service nature, and complies with the residence test I have mentioned and the other test which I shall mention, it can, I think, be reasonably regarded for the purposes of claiming against the War Claims Fund as a Canadian, but otherwise not.

The third requirement is this: a substantial part of the corporation's capital (not necessarily its share capital) should be Canadian. As the policy of this country has for many years been to encourage the inflow of capital for investment in industrial, mining, commercial and similar operations it would seem inappropriate to require a very large proportion of the capital to be Canadian before regarding the corporation as Canadian. In fixing the proportion probably no better precedent can be followed than that recently set by the United States in the agreement dated July 19, 1948, between the United States and Yugoslavia regarding pecuniary claims of the United States and its nationals against the Government of Yugoslavia on account of the nationalization and other taking by Yugoslavia of property and of rights and

interests in and with respect to property which occurred between September 1, 1939, and the date of the agreement. Article 2 of the agreement is as follows:

> "The claims of nationals of the United States to which reference is made in Article 1 of this Agreement include those respecting property and rights and interests in and with respect to property, which at the time of nationalization or other taking were:
>
> (A) Directly owned by an individual who at such time was a national of the United States.
>
> (B) Directly owned by a juridical person organized under the laws of the United States, or a constituent state or other political entity thereof, twenty per cent or more of any class of the outstanding securities of which were at such time owned by individual nationals of the United States, directly, or indirectly through interests in one or more juridical persons of whatever nationality, or otherwise; or
>
> (C) Indirectly owned by an individual within category (A) above, or by a juridical person within category (B) above, through interests, direct, or indirect in one or more juridical persons not within category (B) above, or otherwise."

I recommend that a corporation claimant be treated as a Canadian at time of loss if it satisfies the residence and trading activities requirements which I have mentioned (as of time of loss) and also the requirement that 20 per cent or more of any class of its outstanding securities be owned (at time of loss) by individual Canadians (as defined above) directly, or indirectly through interests in one or more juridical persons of whatever nationality or otherwise. The scheme of compensation of corporations and their shareholders will then be practically the same as that adopted by the United States for compensation of corporations and shareholders having nationalization claims against Yugoslavia except that for corporations the nationality test ("organized under the laws of the United States, or a constituent state or other political entity thereof") will be replaced by the residence and trading activities tests which I have mentioned. These I consider more suitable in the light of the obvious lack of real significance of the place of registration.

If the passing of these three tests is required in determining whether a corporation is a Canadian it will in my opinion have the effect of singling out corporations whose real interests are Canadian and whose successful operations are of importance to Canadians. While the principle which should apply to the payment of compensation for losses to individuals arising from war operations is based upon the recognition, as the converse of the duty of allegiance owed by the individual, of the right to be afforded protection and compensation for loss, the principle applicable to the payment of compensation to corporations should be the benefit of Canadians or of interests that are essentially Canadian. This necessitates the selection of corporations in which more than a negligible amount of Canadian capital has been invested and which may be said to carry on essentially Canadian operations. The application of the three tests recommended will, in my opinion, give effect to this principle.

I should add that a corporation claimant should be treated as a Canadian at time of presentation of its claim if it satisfies the residence and trading activities requirements which I have mentioned (as of time of presentation) and also the requirement that 20 per cent or more of any class of its outstanding securities be owned (at time of presentation) by individual Canadian citizens directly, or indirectly through interests in one or more juridical persons of whatever nationality or otherwise.

There are some corporate claimants of a religious, educational, or charitable character which have their residence in Canada but which do not, from their very nature, carry on trading activities. These should be eligible to claim and and the definition of Canadian should be framed in such a way as not to exclude them.

As will be seen later it will be recommended that Canadians who hold, directly or indirectly, ownership interest in corporations or associations, not Canadian, whose property was lost or damaged by operations of war should be eligible to claim compensation for such losses. The definition of the word "Canadian" as applied to corporations is, therefore, of importance not only in cases where a Canadian corporation suffered losses of or damage to property owned by it abroad but in cases where the Canadian corporation owned shares—in some cases all the shares—in foreign corporations which suffered losses of or damage to property.

The definition of the word "Canadian" as applied to governments should cause no difficulty. The Government of Canada, the Government of any province, including a province which was not part of Canada at time of loss, and the Government of any municipality in Canada should be regarded as Canadian.

It may be added that among the corporations excluded by the application of the suggested tests would be investment companies, whether non-resident owned or not, personal corporations which carry on no trading activities either themselves or through wholly owned or controlled subsidiaries, foreign business corporations, and non-resident corporations, these terms all being used in the sense in which they are used in the Income Tax Act. The shareholders in such corporations who were Canadians at the time of loss may have valid claims even if their ownership interests in the property lost are indirectly held by them through such corporations, the shareholders having, and the corporations not having, the status of Canadians.

Claims in Respect of Death and Personal Injury

The question to be discussed under this heading is what claims arising out of World War II and asserted by Canadians in respect of death or personal injury should be admissible for compensation and to what extent.

It is obvious that not all persons who were injuriously affected by the war should be compensated out of reparations for their injuries or losses. Many claims for such compensation are clearly inadmissible, whether the claims be in respect of death, personal injury, maltreatment, or loss of or damage to property. War invariably causes loss and hardships of varying kinds to most, if not all, persons in a belligerent nation. The wife who is widowed by the death of her husband on service, the member of the forces who is disabled while on service, the member of the forces who, while he returns unscathed, has lost years from his career or business and possibly a great deal of income, the business man whose operations are restricted or closed down by necessary government regulation, the individual on a fixed income whose income taxes soar as a result of the war, the reduction in the standard of living from scarcities or inflation, all these are examples of groups, some of them very large groups, of persons in a belligerent nation who are injuriously affected by a war. It has always been recognized that compensation cannot possibly be paid to all the individuals in these large groups in a nation and that only those war claims should be admissible which arise from particular wartime activities that produce special injury or loss to the individual affected which he suffers over and above the general burden shared by great classes of the community. It is necessary

at the outset, therefore, to specify the wartime activities which should be regarded as legitimate bases for admissible war claims in respect of death or personal injury.

Assume a civilian is injured by an explosion in a wartime explosives factory where he became employed because his normal peacetime employment had ended because of the war. In a sense his injury arose out of the war. The plant was producing war explosives; he became employed in it because of the war; his work is in a sense an actual operation of war. Or assume a civilian who in peacetime worked in a factory but because it closed as a result of the war became employed on a farm and was injured while farming. He would never have become employed on the farm but for the war and farming is important to the carrying on of the war. Is either of these injuries to be treated as an injury arising out of the war so that an admissible war claim may be made in respect of it? No clear or well-established principles have been laid down for assistance in answering such questions. The best that can be done is to keep in mind certain considerations. One is that almost all activities of persons in a nation during wartime are in some way connected with the war, that obviously not all deaths or injuries occurring in these activities can be compensated for, and that there must be some immediate connection between the death or injury and activities of a peculiarly wartime nature as distinguished from civilian activities directed to wartime ends. Another consideration is that the losses to be compensated must be of such a nature that they fall on particular individuals so as to impose a type of burden on them greater than the general burdens that fall on all or most persons in wartime. Another consideration is the necessity of dealing fairly and justly with all Canadians and the unfairness of paying compensation to a small group for a type of loss or for an element of loss that does not differ from losses or elements of loss for which other Canadians are not compensated. Taking these considerations into account I have come to the conclusion that loss from death or personal injury should be considered as giving rise to an admissible war claim where the death or personal injury was caused by:

1. the carrying on of actual warfare by any of the belligerent armed forces, whether army, navy, or air forces, and whether those of an enemy or an ally of an enemy, or Canadian or Allied forces anywhere in the world outside of Canada; or

2. maltreatment in internment or detention by civilian or military authorities of an enemy or an ally of an enemy. (A list of the countries to be considered allies of an enemy for this and other purposes mentioned in this report will have to be compiled without strict limitation of the word "ally" to its dictionary meaning when the regulations for guidance of Commissioners are made, the evidence before me not being sufficient to enable me to do so).

The recognition that loss caused by death or personal injury resulting from these causes should give rise to admissible war claims is, generally speaking, in accordance with the principles applied in the past by tribunals functioning under treaties or otherwise, and in my view gives effect to the considerations mentioned above. There is no doubt that the carrying on of actual warfare by the belligerent armed forces is a war operation. It is of the essence of war. Similarly internment by enemy governments is an act of war. Individuals are interned or detained because of their enemy character. For reasons to be given later in the discussion of maltreatment, compensation should not be payable, in my opinion, for mere internment, but where internment is accompanied by maltreatment which results in the death or injury of the person interned then losses arising from the death or injury would appear to be losses which, along with those arising from death or injury from actual warfare, should be compensated.

My recommendation that the warfare must have been carried on outside of Canada to give rise to a claim is made because no actual warfare by belligerent forces was carried on in Canada. A great range of training operations was carried on but I believe that adequate provision has been made to compensate losses from death or injuries occurring in Canada from training.

Consideration has been given to the question whether compensation, not only of death and personal injury claims but of property claims, should not be confined to cases where the loss or injury arose out of the action of the enemy or out of illegal warfare of the enemy. The earlier Commissions issued after World War I in Canada to Commissioners appear to have contemplated illegal warfare of the enemy as the basis of war claims, and the terms of reference of the Sumner Commission to have contemplated action of the enemy as the basis of such claims. However, if reference is made to Article 232 of the Treaty of Versailles and Annex I (1) of that treaty it will be seen that Germany undertook, at least as far as death and personal injuries were concerned, to make compensation for damage resulting from operations of war carried on by both groups of belligerents wherever arising. It would, I am convinced, be quite impracticable to attempt to confine compensation to cases of enemy action or illegal enemy action, particularly as conditions of warfare in many parts of the world were such that the identity of the forces, agencies or persons causing the injury or loss to Canadians is quite unascertainable. Moreover, it would be discriminatory to do so and my recommendations have been framed accordingly.

The next question is, assuming that compensation is to be paid for losses resulting from deaths or injuries due to these causes, is compensation to be paid from the War Claims Fund for all such deaths or injuries? In my opinion there should be excluded from the deaths or injuries to be compensated for out of the War Claims Fund the death or injury of a person to whom the Pension Act and certain other Acts applied. More accurately, where a claim is for loss resulting from death the rule in my opinion should be that the deceased must have been a civilian (as defined below) at the time of the act complained of as causing the death, and where the claim is for loss resulting from personal injuries the rule should be that the person injured must have been a civilian at the time the personal injury was inflicted. Civilian in this context should be taken as meaning a person who, at the time of the act complained of as causing death or at the time the personal injury was inflicted, as the case may be, was not a member of the armed forces of any country and was not a member of any organization, group or other class to or in respect of all or some members of which benefits have been provided by way of pension, gratuity, or other compensation for injury or death arising out of services in World War II under:

The Pension Act,

The Women's Royal Naval Services and the South African Military Nursing Services (Benefits) Act,

The Civilian War Pensions and Allowances Act,

The Special Operators War Service Benefits Act,

The Supervisors War Service Benefits Act,

or any similar statute or regulation of Canada, Newfoundland, or of any other country, notwithstanding that such pension, gratuity or compensation may not be payable to or in respect of that person although he is a member of the class. Parliament, by the Acts mentioned, has made provision for compensation for death of or injuries to those who were in the armed services and other groups mentioned and should be deemed to have intended such provision to be adequate and exhaustive. Canadians, if any, who served in similar services or other groups established by other countries may be assumed to have accepted the

incidents of service including the conditions of pension entitlement there. Moreover, Parliament having considered the whole question of entitlement to pensions, gratuities and other benefits of Canadians whether in the Canadian or foreign services, should be taken to have covered the field leaving no area for claims on reparations. Obviously if the War Claims Fund were opened to claims for supplements to pensions the administrative difficulties of a Commissioner would be virtually insuperable, his work would parallel or duplicate that of the Canadian Pension Commission and it would be completely impossible to give any estimate whatever of the amounts available for claimants for whom no statutory provision has been made.

The terms of reference recite that claims have been asserted in respect of death, personal injury, maltreatment, and loss of or damage to property. If the two causes enumerated above as necessary to a valid war claim for compensation for death or personal injury be treated and referred to as "war operations" the rule should in my opinion be that the death or injury in order to be compensable must in every case be the direct consequence of war operations. War operations must have been the direct, or in other words the real or effective cause of the loss or injury. In determining whether the war operation is the direct cause of the death or personal injury and whether the death or personal injury is the direct consequence of war operations the Commissioner should be governed by the principles applied by the civil courts in actions of tort or delict. Once it is determined that the death or personal injury is the direct result of war operations the question may arise as to whether some or any of the consequences of that death or injury, or of the act causing it, are so remote as to prevent compensation being properly payable therefor. In a civil action for damages for negligence the damages must not be too remote.

Halsbury, 2nd. Ed., Vol. 23, p. 729, states:

> "Remoteness of damage in cases of negligence does not depend on whether or not the consequences of the negligent act could have been reasonably foreseen, nor on the length of time intervening between the negligent act and the injury and its consequences, but it does depend on whether or not there is an absence of direct, necessary, and natural sequence between them, and to this extent the inquiry is similar, though subsequent, to that of whether the negligent act is the effective cause of the injury. It is for the judge to decide whether or not the damage is too remote."

Similarly damage which is too remote a consequence of war operations should not be compensable. And the Commissioner in deciding whether it is too remote should be governed by the principles which apply in the civil courts in actions for damages for negligence.

But there may be cases where personal injury is the direct result of war operations and where the damage would not be regarded by the civil courts as too remote but where, nevertheless, the injury should, in my opinion, not be compensable to the extent to which damages would be recoverable in a civil action for tort. I say this because much consideration has led me to the conclusion that the established rules laying down the measure of damages for tortious acts in the courts are in many respects incapable of application, justly, to war claims. I shall, therefore, state the respects in which these should be modified in their new application and, as completely as possible, the rules for measurement of the compensation which should apply to death and personal injury claims. This modification of the principles determining the measure of damages will work in some instances in favour of and in some cases against the claimants.

Death Claims

Many claims have been made and doubtless others will be made for compensation for the death of those who were drowned as a result of war operations at sea. The claimants in most cases are the dependents of the deceased. There are or may be other claims for compensation for death by bombing, maltreatment, exposure and other acts or conditions which either were or are the direct result of war operations. The Fatal Accidents Act of 1846 (Lord Campbell's Act) made death a cause of action for certain torts and the principles of that Act have been adopted in all jurisdictions in Canada. Sections 1 and 2 of the Fatal Accidents Act are as follows:

> "1. Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.
>
> 2. Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused . . . and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

The words "parent" and "child" as used in the Fatal Accidents Act have, by judicial interpretation, and amendments in some jurisdictions, been given an extended meaning.

The counterpart of the Fatal Accidents Act in the Civil Code of Quebec is Article 1056, the relevant parts of which are as follows:

> "In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death . . .
>
> In all cases no more than one action can be brought in behalf of those who are entitled to the indemnity and the judgment determines the proportion of such indemnity which each is to receive.
>
> These actions are independent of criminal proceedings to which the parties may be liable and are without prejudice thereto."

Both the Fatal Accidents Act and Article 1056 C.C. provide that only one action can be brought on behalf of the dependents of the deceased. In the common law jurisdictions this is normally brought by the executor or administrator of the deceased, but if there is none, or if he delays in bringing it, the action may be brought in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of the executor or administrator, and every action so to be brought shall be for the benefit of the same person or persons as if it were brought by and in the name of such executor or administrator. The rule that only one action can be brought on behalf of those entitled applies whether the action is brought by the executor or administrator and whether in a common law jurisdiction or in Quebec and the judgment of the court determines the proportion of the damages which each of those entitled shall receive.

The principle of the Fatal Accidents Acts being that of giving to dependents statutory compensation for the financial loss which they have sustained through the death, the measure of damages is the pecuniary loss suffered by the dependents as a result of the death. No damages can be given for the mental sufferings they have undergone or by way of *solatium* for their wounded feelings or the pain and suffering of the deceased. The pecuniary loss in question means the actual financial benefit of which the dependents have in fact been deprived, whether the benefit was a result of legal obligation or of what may reasonably have been expected to take place in the future. It is the amount of the pecuniary benefit which it is reasonably probable the dependents would have received if the deceased had remained alive. The pecuniary advantage need not have been received in the form of money or goods but may have been derived from services rendered by the deceased. A reasonable expectation of pecuniary benefit can be established by showing that the deceased has in the past contributed to the support of the dependents and from that fact it can be inferred that the support would be continued in the future. If the deceased had not attained his full earning capacity, damages can be given on the assumption that his contributions would increase as his earning capacity increased. It is not necessary that the deceased should have been actually earning wages at the death, if there is a reasonable expectation that wages will be earned in the future with the result that financial benefit will accrue to the dependents. The mere existence of the relationship of husband and wife or parent and child is not enough to show pecuniary loss and does not even raise a presumption of such loss. Property left by the deceased by his will so as to benefit his dependents must be taken into account in ascertaining the damages and so must money coming to the dependents under a settlement or under a partnership or other agreement in consequence of the death. If the will of the deceased so disposes of his property that although all his property goes to the dependents it is not divided amongst them according to the extent of their individual dependency, damages can be awarded to those dependents who have suffered loss.

The whole question of taking into account benefits from the death in estimating the pecuniary loss of a dependent resulting from the death will be very important if my recommendation below that claims for compensation for personal injuries survive for the benefit of the estate is adopted. A sustains personal injuries as a result of war operations. He lives for a time then dies as a result of those war operations. At the time of his death he had a claim which, if he could have got it dealt with, would have been a good and valid war claim for compensation for personal injuries. My recommendation will be that, subject to the conditions mentioned below, it survive for the benefit of his estate. The claim of a dependent of A based on the death of A is not affected by the survival of the personal injuries claim for the benefit of the estate if that dependent does not share in the estate (as e.g. if he gets nothing under A's will). But if he obtains a benefit from the deceased's estate that benefit must be taken into account in determining the pecuniary loss which he has suffered from the death of A. The damages under the Fatal Accidents Acts are given to compensate the recipient on a balance of gains and losses for the injury sustained by the death. So when I recommend pecuniary loss as the measure of damages on death claims below I mean loss after deduction of the dependent's interest, under the will or intestacy as the case may be, in the compensation payable for personal injuries to the deceased.

I have given some of the principles applied in determining whether there is pecuniary loss as a result of the death and its extent. Those I have mentioned are, of course, illustrative rather than exhaustive. I recommend that in dealing with claims based on the death caused by war operations the

Commissioner admit claims by dependents who prove pecuniary loss resulting from the death in accordance with the principles established under the Fatal Accidents Acts subject to the following provisions:

1. Dependent means the husband, wife, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, grand-daughter, stepson or stepdaughter, of the deceased, person of whom the deceased was the adopted child, person who stood *in loco parentis* to the deceased, adopted child of the deceased or person to whom the deceased stood *in loco parentis,* who has suffered pecuniary loss as a result of the death of the deceased.

2. Any dependent may claim on his own behalf and more than one may join in claiming. There seems to be little reason for providing that no more than one claim may be made in respect of a death or for providing that claims may be made by executors and administrators. Of course, the Commissioner may wish before hearing a claim to require notice to the executor or administrator, if any, or to any other dependent.

Reference is made above to the taking into account of benefits from the death in estimating the pecuniary loss of a dependent resulting from the death. In many, if not all, Canadian jurisdictions it has been provided that in assessing damages in actions under the Fatal Accidents Acts there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance. I recommend that the principle of such provisions be applied to the assessment of what, in the light of the foregoing, may be referred to as Fatal Accidents Acts claims against the War Claims Fund. In this respect I would treat (a) life insurance policies differently from (b) policies of insurance against accident and against property loss. As will be seen it will be recommended that the moneys paid under (b) be taken into account in estimating the pecuniary loss of claimants. But there are reasons why life insurance should not be taken into account in computing the pecuniary loss arising from death resulting from war operations. These reasons were well set out as follows by the United States-German Mixed Claims Commission, which sat after World War I, in that part of its Decisions and Opinions quoted in Whiteman, Vol. 1, pp. 683 and 684. The Commission said:

> "Counsel for Germany insist that in arriving at claimants' net loss there should be deducted from the present value of the contributions which the deceased would probably have made to claimants had he lived all payments made claimants under policies of insurance on the life of the deceased. The contention is opposed to all American decisions and the more recent decisions of the English courts. The various reasons given for these decisions are, however, for the most part inconclusive and unsatisfactory. But it is believed that the contention here made by the counsel for Germany is based upon a misconception of the essential nature of life insurance and the relations of the beneficiaries thereto.
>
> Unlike marine and fire insurance, a life insurance contract is not one of indemnity, but a contract absolute in its terms for the payment of an amount certain on the happening of an event certain—death—at a time uncertain. The consideration for the claimants' contract rights is the premiums paid. These premiums are based upon the risk taken and are proportioned to the amount of the policy. The contract is in the nature of an investment made either by, or in behalf of, the beneficiaries. The claimants' rights under the insurance contracts existed prior to the commission of the act complained of, and prior to the death of deceased. Under the terms of the contract these rights were to be exercised by claimants upon the happening of a certain event. The mere fact that the act complained of hastened that event can not inure to Germany's benefit, as there was no uncertainty as to the happening of the event, but only as to the

time of its happening. Sooner or later payment must be made under the insurance contract. Such payment of insurance far from springing from Germany's act, is entirely foreign to it. If it be said that the acceleration of death secures to the claimants now what might otherwise have been paid to others had deceased survived claimants, and that therefore claimants may possibly have benefited through Germany's act, the answer is that the law will not for the benefit of the wrongdoer enter the domain of speculation and consider the probability of probabilities in order to offset an absolute and certain contract right against the uncertain damages flowing from a wrong."

If the proceeds of life insurance policies are not to be taken into account in computing the pecuniary loss arising from the death it follows that they should not be regarded as a species of satisfaction otherwise provided for.

Personal Injury Claims

Many claims have been made and others may be made for compensation for personal injuries caused by war operations. It is desirable at this point to discuss the principles which should apply to determining the amount of compensation for these injuries. It must always be kept in mind, of course, that the injuries themselves to be compensable must be a direct result of war operations and that no compensation can be paid for damage which is too remote. But if the amount of compensation were determined on the principles governing the measurement of damages in an action of tort or delict it could, and in proper cases would, include compensation for more than the actual pecuniary loss. A question that arises is whether awards out of the War Claims Fund should be compensatory of pecuniary loss only or whether they should in some cases include sums in the nature of punitive damages or damages other than compensation for pecuniary losses. For reasons to be given, I am of opinion that they should be compensatory of pecuniary loss only and I shall now state the principles which I think should apply to the measurement of the compensation. These principles should extend to claims for compensation for personal injuries caused by maltreatment but they have no application to claims for compensation for maltreatment *per se,* which will be dealt with separately.

In my view the general principle upon which compensation for personal injuries resulting from war operations should be awarded is that the compensation should be the amount that would be allowed in accordance with the ordinary principles applied in our civil courts *as pecuniary loss* resulting from the injuries. The use of pecuniary loss as the sole basis for compensation is a departure from the rules normally applied in the courts in actions of delict or tort. Where a person is injured by the negligence of another he is entitled to damages for the injuries, not only in respect of pecuniary loss but of certain other matters. Charlesworth on Negligence, 2nd. Ed., p. 559, summarizes the grounds for claim as follows:

"In actions for damages for personal injuries, the matters to be taken into account in ascertaining the damages are: the pain and suffering endured, past, present and future, the inconvenience and loss of enjoyment of life sustained, past, present and future, injury to health, any shortening of the expectation of life, and the present and future financial loss."

In my opinion, there should be excluded as grounds for compensation from the War Claims Fund claims in respect of pain and suffering, inconvenience, loss of enjoyment of life, injury to health not resulting in impairment of earning capacity, and any shortening of expectation of life. It does not seem appropriate that one group of individuals should be compensated for pain and suffering sustained in time of war when so much pain and suffering has been sustained

by many members of the community for which no compensation is payable. The same is true of loss of enjoyment of life, injury to health not resulting in impairment of earning capacity and shortening of expectation of life. In each of these cases there is a common element, namely, they do not involve pecuniary loss to the claimant. They represent an attempt made by the law in ordinary circumstances to compensate in a pecuniary manner for losses of intangible human assets. It is to be borne in mind also that there is a difference in principle between the position of a claim for damages for tort and a claim for loss resulting from the war. In claims for tort the law is endeavouring to reimburse one person for all losses sustained by him as a result of the fault of another. Since the latter party is at fault he should reimburse the former for all forms of loss. With respect to war claims, however, the principle that appears to be followed is to reimburse individuals for special losses peculiar to them. A distinction must be drawn between the losses which are special or peculiar to the claimant and losses of the kind which fall generally on many members of the community. Pain and suffering, loss of enjoyment of life, and the other intangible losses I have mentioned, are suffered to a greater or lesser extent by many members of the community in time of war. They must, therefore, be excluded from the category for which compensation is to be paid.

Once these elements of loss are excluded, in my view it is proper to apply the ordinary principles of our civil law in determining the pecuniary or financial loss, past, present and future, resulting from an injury of the class mentioned above, for which compensation is to be paid. These principles embrace two categories of persons, namely, the persons who were injured, and other persons who sustained loss by reason of injury to the injured person.

The injured person should be compensated for all "special" and "general" damages based on financial loss, e.g. medical, hospital, nursing expenses, necessary employment of extra assistance, loss of earnings down to the time of adjudication, loss of earning capacity for the future and all other pecuniary losses which would be compensated by damages in a civil action in the courts.

As regards persons other than the injured person, the same principles as are applied in our civil courts should apply in so far as they apply to pecuniary losses. The best example of this type of claim is a claim by a husband for medical and other expenses to which he has been put as a result of personal injuries inflicted on his wife. As regards special damages, I adopt as applicable to war claims the following principle stated by Charlesworth, p. 575:

> "The principle is not confined to husband and wife, but extends to parent and child and to all cases in which the person suffering the special damage is in fact maintaining, in whole or in part, the injured person. The exact boundary line between gratuitous assistance given by a stranger, which is not recoverable, and the assistance given by a parent, relative, person *in loco parentis,* guardian, master or other person, which is recoverable, has not been determined, but it would seem that a person who has in fact incurred expense in providing for the cure and restoration to health of the injured person will be entitled to recover such expense, provided that the expense was reasonably incurred and that it was reasonable that it should be incurred by the person claiming it."

As regards claims by husbands for compensation for the pecuniary loss suffered by them from being deprived of their wife's services, I would also apply the principles applied in the civil courts. But for the same reason that I would not allow claims for pain and suffering and loss of expectation of life, I would not allow a claim made by a husband for loss of *consortium* apart from loss of services or any other non-pecuniary loss arising from personal injuries to his wife.

With regard to those parts of awards made up of expenditures made by the injured person or the claimant as a result of the personal injuries (analogous to special damages), it will be recommended that they bear interest from the time made to settlement. But compensation for other pecuniary losses suffered between the date of the injury and the date of adjudication such as the estimated loss of earnings during that period and for future losses of earnings or earning capacity (all of which are analogous to general damages) will bear interest from the date of the injury. It is, therefore, important that the adjudicating Commissioner in determining the amount of compensation for pecuniary loss other than that analogous to special damages, while taking into account events and circumstances between the infliction of the injury and the time of adjudication, limit the amount recommended to an amount which, if it had been paid at the time of injury, would have been a fair compensation to the claimant for future pecuniary loss.

As some of the claimants for compensation for personal injuries have died since these injuries were sustained and others may die before settlement of their claims, the question arises whether their claims should survive for the benefit of their estates, or for the benefit of their dependents or otherwise.

In the civil courts a maxim is often quoted: *Actio personalis moritur cum personâ.* In some jurisdictions in Canada a cause of action for damages for personal injuries or death dies with the person. In others it survives for the benefit of the estate. There are, I think, good reasons why war claims for compensation for personal injuries and death should survive. Many of these claims arise from injuries inflicted or death occurring as long ago as 1939. While there may be little injustice in permitting the cause of action to die with the person, if the person had an opportunity of securing compensation while alive, the injustice is greater if no such opportunity existed. Then too, if, as I recommend, compensation be limited to pecuniary loss the reason for dealing with a war claim for personal injuries or death differently than with a claim for loss of or damage to property is not obvious. I am of the opinion, therefore, that such claims should survive. The next question is whether they should survive to the estate or in some way which will give the dependents more protection and eliminate the possibility that creditors, distant relatives and legatees who are strangers and others who would appear to have little moral claim on the War Claims Fund will receive a share of it.

I have come to the conclusion that the claims should survive for the benefit of the estate for the following reasons:

First, of the small number of cases where the person who first had the claim for compensation for personal injuries or death had died or will die before settlement, it is probable that the great majority are cases where survival of the claim to the estate would be substantially the same in its practical effect as survival to the dependents.

Secondly, if claims for loss of or damage to property are dealt with, as respects survival, as if they were actions for damages for loss of or damage to property—and I recommend that they be so dealt with—then there is little reason for treating death and personal injury claims, when the compensation is based upon pecuniary loss only, in a different way.

A third and somewhat minor reason why survival of claims should be for the benefit of the estate rather than for dependents or some class of them is that if the claim passes to the estate principles worked out by the English courts in interpreting and applying the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act of 1934 and by the Canadian courts applying similar legislation in Canada may be very helpful to the Commissioner. (See, for example, *Ponyicki* v. *Sawayama* [1943] S.C.R. 197). They will provide him with authority for dealing with cases where the death, though not immediate,

has been caused by war operations and there are two claims, one by dependents for pecuniary loss resulting from the death, the other by the estate for compensation for personal injuries sustained by the deceased. The principle is well stated by Charlesworth, p. 581, as follows:

> " . . . if the damages awarded under the Law Reform Act, 1934, go, either on an intestacy or under the terms of the deceased's will, to any person who is a dependent under the Fatal Accidents Acts, they will *pro tanto* reduce the amount payable to that dependent under the latter Acts. This is because in estimating pecuniary loss regard must be had to any benefits, other than money payable under a contract of insurance, each dependent derives from the death of the deceased."

In computing the pecuniary loss to a claimant caused by personal injuries, should sums which he has been paid under policies of accident, sickness or similar insurance be taken into account? After World War I they were: (Report of Commissioner Friel dated December 14, 1927, Reparations, Vol. I, p. 18). In view of this fact and the distinction between the nature of such payments and those of life insurance suggested by the passage quoted above from the opinions of the United States-German Mixed Claims Commission I think the rule followed after World War I should be followed. I may add that the files disclose no collection of accident or similar insurance moneys on account of injuries resulting from war operations.

On any claim surviving to an estate for compensation for personal injuries to the deceased the compensation should be calculated without reference to any loss or gain to the deceased's estate consequent on the death (except that account should be taken of sums payable to the estate under policies of accident as distinguished from life insurance).

There may be some uncertainity as to what is meant above by the recommendation that a claim should survive for the benefit of the estate. My meaning is that the claim, to the extent that it would have been valid and admissible if the deceased could have got it dealt with in accordance with the principles of these recommendations just before his death, should survive as if it were a cause of action for damages vested in the deceased at the time of his death which survives for the benefit of his estate.

The question as to whether there should be ceilings on awards for death and personal injuries has been considered and will be dealt with in the section of the report below which deals with priorities. That section should be read with this section of the report.

Maltreatment

Many claims have been made in respect of maltreatment and it is now necessary to consider whether, within what limits, and to what extent they should be admitted for compensation. Maltreatment cannot be accurately defined, but it should be observed at once that it does not include mere hardship resulting from war or wartime activities, for example, exposure at sea or on land even though this results directly from belligerent armed action. Nor can I find that when maltreatment has been put forward as a ground for compensation after a war it has even been regarded as including violation of the rules of warfare on land or sea or in the air except in cases where there has been internment or detention by the enemy. By usage the term is confined to maltreatment of persons either interned or detained by enemy authorities, military or civil. The person maltreated may at the time have been either a civilian or a member of the armed forces. The claims in respect of alleged maltreatment of members of the Canadian armed forces will frequently be

referred to below as prisoner of war claims, and those for alleged maltreatment of Canadians who were not members of the armed forces of Canada as civilian claims. Most if not all of the claims filed with the Canadian Government in respect of maltreatment in World War II have been for compensation for maltreatment in internment camps, a term which will be used to describe all camps used by ex-enemy powers for the purpose of restraining the liberty of movement of Allied nationals whether civilians or not. But there seems to be no reason why maltreatment in detention by enemy authorities other than internment should be dismissed as non-compensable if it would be regarded as compensable where there was internment. The word "detention" is here used as including confinement or imprisonment, as well as enforced residence in an enemy or enemy-occupied country. Mere internment has never been and should not be regarded as, in itself, constituting maltreatment. Under international law it is recognized as quite proper for a belligerent to intern enemy aliens. (Wheaton on International Law, 6th Ed., Vol. II, p. 706). The internment and confinement of prisoners is similarly recognized. Mere internment has never been recognized as a ground for a claim for reparations in treaties or otherwise by international usage. "Internment in itself must be regarded as permissible." (First report, Sumner Commission, p. 13). Moreover, it has never been recognized domestically in Canada as giving rise to claims for compensation. The claims which have been made for loss of income during or as a result of internment should, therefore, not be confused with maltreatment claims, nor should they be allowed. It may be argued that if compensation is to be paid not on the basis of wrong done but on the basis of special losses suffered, the propriety or permissibility of internment is irrelevant. But departure from the established principle that compensation should not be paid for internment *per se* would be too great a departure for me to recommend. Moreover, internment (without maltreatment) can hardly be regarded as inflicting a special loss but rather one which may be common to the rank and file of Canadians in enemy or enemy-occupied countries. It has an upsetting effect on the lives of those interned but the effect is of the kind flowing to large classes of Canadians (in this case those in enemy or enemy-occupied countries) from the war itself. Indeed in many instances the lot of those interned was better than that of those left at large. The British hand-book, to be referred to, makes this abundantly clear (pp. 82 and 83).

The only cases on the files of internment or detention during which maltreatment is alleged to have taken place are those of internment or detention by the Japanese and Germans. My recommendation is that maltreatment during internment or detention by authorities of an enemy or an ally of an enemy be treated as a ground for compensation. It will, therefore, be necessary to refer to camps administered by Italy and certain other countries. As indicating the scope of the problem raised by the maltreatment claims some estimate may be given of the number of civilians and prisoners of war interned by the German and Italian authorities and by the Japanese authorities. While an estimate can only be approximate, based as it is largely on examination of the files, it may be considered that there were about 1,200 Canadian civilians interned by Germany and Italy in enemy or enemy-occupied territory. In addition there were on March 31, 1945, about 6,500 Canadian prisoners of war in German hands. It is probable that some of these had before the armistice with Italy in September, 1943, been interned in Italy.

Examination of the files indicates that approximately 800 Canadian civilians, men, women and children, were interned in camps operated by the Japanese both in Japan and Japanese-administered territories, and in Hong Kong, Shanghai and occupied China, Malaya, the Netherlands East Indies, Burma, the Philippines, and the British sections of Borneo. In addition there were camps operated by the Governments of Indo-China and Siam and it will be a question of evidence whether and during what periods these camps were in

substance and effect under the control of the Japanese. This question may be important as it will be my recommendation that no claims for maltreatment in the Far East be paid on a *per diem* basis unless the camps were at the time of the alleged maltreatment operated openly or in effect by the Japanese. There is no evidence that the French in Indo-China or the Siamese maltreated internees, although instances of such maltreatment may come to light. The publication entitled "The Work of the Prisoners of War Department during the Second World War" issued for official use by the British Foreign Office in August, 1950, which I shall refer to as the British hand-book, states with regard to Indo-China that "so far as they could, the French tried to make life for these internees tolerable, and in so doing they frequently risked incurring the anger of their Japanese masters" (p. 155), and with regard to the civilian camp in Bangkok that "on the whole, however, there was little ground for complaint and the Siamese showed themselves both humane and co-operative" (p. 155). The British hand-book, however, indicates that there was brutal treatment by the Japanese military authorities in Siam of British and Allied prisoners of war, and that the Siamese maintained that these prisoners were the sole charge of the Japanese. As to Canadian prisoners of war in the Far East, approximately 1,750 members of the Canadian armed services were interned in camps in some or all of the countries in the Far East mentioned above. Of these nearly 300 died in internment. The liberation of the survivors took place in September, 1945, at the end of the war. It should not be assumed that there were no Canadians at large in Germany, Italy or Japan or in the countries occupied by these powers during the war. There may have been many. And there were apparently many cases of enforced residence under enemy supervision, such as the so-called house arrest cases.

In considering maltreatment it is necessary to refer to the International Convention of July 27, 1929, relative to the treatment of prisoners of war, commonly referred to as the Geneva Convention. This Convention was signed by the representatives of 47 countries including Germany, Italy and Japan. Article 92 was as follows:

> "The present Convention shall enter into force six months after at least two instruments of ratification have been deposited. Thereafter it shall enter into force for each High Contracting Party six months after the deposit of its instrument of ratification."

Article 95 was as follows:

> "A state of war shall give immediate effect to ratifications deposited and to accessions notified by the belligerent Powers before or after the commencement of hostilities. The communication of ratifications or accessions received from Powers in a state of war shall be effected by the Swiss Federal Council by the quickest method."

Although ratified by Italy (on March 24, 1931) and by Germany (on February 21, 1934) the Geneva Convention was never ratified by Japan. However, following consultations between the United Kingdom and the United States in which various Commonwealth governments participated, the United Kingdom at the end of 1941 requested the Argentine Government to inform the Japanese Government that the Governments of the United Kingdom, Canada, Australia and New Zealand were observing the provisions of the Geneva Convention so far as it concerned Japan and to ask assurance that Japan would do likewise. On December 31, 1941, the Canadian Secretary of State for External Affairs instructed the Canadian Minister to Argentina to confirm the representations made by the United Kingdom on behalf of Canada. The Japanese Government replied that the Imperial Government had not ratified the agreement concerning the treatment of prisoners of war dated July 27, 1929, and therefore it would not be bound to any extent by the said agreement but would apply *mutatis*

mutandis the provisions of the agreement toward the British, Canadian, Australian and New Zealand prisoners of war under Japanese control and that the Imperial Government would consider the national and racial manners and customs under reciprocal conditions when supplying clothes and provisions to prisoners of war. The British hand-book refers to this interchange of Notes as follows:

> "When, in January 1942, we made enquiries through the Argentine Government, then protecting British interests, we were informed that the Japanese were willing, *mutatis mutandis,* to observe the Prisoners of War Convention which they had never ratified. It was almost at once clear that this meant that they would observe it, if it suited them to do so, and that they would apply it as they saw fit. On the other hand, they were always ready to complain of the most trivial infringement of the Convention by us or by our Allies." (p. 127).

It is a well-established principle of international law that a treaty whose text stipulates that ratification is necessary must be ratified before it is binding. It follows that there was no binding agreement on the part of Japan to observe the Geneva Convention with any of the countries which received the assurance in 1942 from the Japanese Government. The maltreatment claims against Japan can, therefore, not be based upon a legalistic interpretation of the Geneva Convention. Neither in my opinion should maltreatment claims against Germany and Italy be based upon such an interpretation for reasons to be given.

A brief reference to the provisions of the Geneva Convention is now necessary. The Geneva Convention provides that prisoners of war shall at all times be humanely treated and protected particularly against acts of violence, from insults and from public curiosity, and that measures of reprisals against them are forbidden (Article 2). It has 97 articles in all, many of them containing detailed provisions as to capture, evacuation of prisoners of war, prisoners of war camps, installation of camps, food and clothing of prisoners of war, hygiene in camps, internal discipline of camps, officers and persons of equivalent status, pecuniary resources of prisoners of war, transfer of prisoners of war, work of prisoners of war, relations of prisoners of war with the exterior, relations between prisoners of war and the authorities, penal sanctions with regard to prisoners of war, disciplinary measures, judicial proceedings, repatriation and accommodation in neutral countries, liberation and repatriation at the end of hostilities, deaths of prisoners of war, and so forth.

It would not, in my opinion, be possible to treat every violation of the Geneva Convention as maltreatment; indeed, the British hand-book indicates that the Government of the United Kingdom found it impracticable to comply in every respect with the Geneva Convention.

Mr. Errol M. McDougall, Commissioner appointed after World War I, in his memorandum on maltreatment dated January 13, 1932, in dealing with the Hague Regulations which enacted rules regarding captivity and declared the humane principles relating to the treatment and care of prisoners of war, said: "Ideal as may be the conditions of captivity provided in the foregoing rules, it is doubtful whether any captor has been, or will be, able to conform completely to this desirable standard. The inevitable exigencies of war bring about departure from the principles stated." (p. 8). Mr. McDougall made no attempt to define the precise meaning of the word "maltreatment" as used in the Treaty of Versailles although he did direct attention to certain acts which in his opinion did not *per se* constitute maltreatment. The following paragraphs from his memorandum (p. 7) give some indication of his approach:

> "Diverse and various have been the incidents of maltreatment urged in support of the numerous claims. While it is not opportune to attempt an exhaustive enumeration of what acts constitute maltreatment, it may, by

way of illustration, be useful to direct attention to certain acts which do not, *per se*, constitute maltreatment. Thus, poor food conditions in Germany, resulting in impaired health, unless deliberately and unreasonably imposed upon a claimant by the authorities, cannot be regarded as maltreatment. Germany's inability to obtain better food, at least during certain stages of the war, was notorious and obtained throughout the country. A hardship arising from necessity and which was borne alike by the captured and the captors does not constitute "maltreatment".

Again, many claimants complain of being inoculated by the German physicians. The fact that the German authorities inoculated and vaccinated prisoners would seem to imply that they were seeking to give them all proper and necessary attention, rather than to maltreat them. Another frequent ground of complaint is the use of paper bandages by the German hospital authorities in dressing the wounds of prisoners, but there is no evidence that any other bandages were available, and it appears that the German authorities were forced to use paper bandages in the dressing of the wounds of German soldiers. This was one of the hardships of war in which claimants were engaged as combatants. Many prisoners who attempted to escape, upon recapture, were severely handled and subjected to solitary confinement under very trying conditions. Provided such punishment was inflicted in accordance with military law and did not go beyond reasonable bounds, it cannot furnish ground of complaint. Germany was entitled to hold her prisoners and to apply to them such disciplinary measures as each case required. To shoot and kill or maim a prisoner in the act of escaping, is not illegal and to punish him, even severely, upon recapture, cannot be termed "maltreatment" unless the punishment, by its violence and inhumanity transgresses the rules applying to the treatment of prisoners by civilized nations. International law recognizes that a prisoner may be "confined with such rigour as is necessary for his safe custody." (Hall's International Law, 8th. Ed., p. 487)."

The United States War Claims Commission in its report to the President dated March 31, 1950, said:

> "The existing body of international law is reasonably clear on such matters as the violence permissible to belligerents, the conduct of seizure, the limitation of devastation, retaliation and ruses, the treatment of enemy aliens and alien property, and the treatment of the wounded and prisoners of war. It is the behaviour falling outside of these and similar well-defined limitations, however, which creates difficulties in the classification and evaluation of war claims. The source of international law, therefore, must be found in those principles on which civilized peoples achieve a consensus either explicitly in international agreements among nations or implicitly in convictions found to be generally recognized as law but not explicitly promulgated as such." (p. 7).

It is clear that there may be such a marked departure from humane treatment that there would be a consensus among civilized peoples that it constitutes maltreatment. While a comprehensive list of acts constituting maltreatment would be impossible to compile, many instances appear from the judgment of the International Military Tribunal for the Far East which may now be referred to.

After hearing a great deal of evidence of alleged war crimes against a number of Japanese accused this Tribunal delivered its judgment in November of 1948. Pages 395 to 448 in Chapter VIII deal with atrocities. The judgment makes it clear that the regulations for the administration of civilian internment camps by the Japanese were not materially different from those providing for the administration of prisoner of war camps. Both were administered by

military commanders who received their instructions through Imperial ordinances and regulations issued by the War Ministry. While the judgment is replete with macabre descriptions of a wide range of acts of inhumanity such as death marches, massacres, and excessive and unlawful punishments, it is probably sufficient to quote the opening page and extracts from the portions dealing with torture, food and clothing, medical supplies, visits by the Protecting Power, and mail. The opening page reads as follows:

> "After carefully examining and considering all the evidence we find that it is not practicable in a judgment such as this to state fully the mass of oral and documentary evidence presented; for a complete statement of the scale and character of the atrocities reference must be had to the record of the trial.
>
> The evidence relating to atrocities and other Conventional War Crimes presented before the Tribunal establishes that from the opening of the war in China until the surrender of Japan in August 1945 torture, murder, rape and other cruelties of the most inhumane and barbarous character were freely practiced by the Japanese Army and Navy. During a period of several months the Tribunal heard evidence, orally or by affidavit, from witnesses who testified in detail to atrocities committed in all theaters of war on a scale so vast, yet following so common a pattern in all theaters, that only one conclusion is possible—the atrocities were either secretly ordered or wilfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces.
>
> Before proceeding to a discussion of the circumstances and the conduct of the accused in relation to the question of responsibility for the atrocities it is necessary to examine the matters charged. In doing so we will in some cases where it may be convenient refer to the association, if any, of the accused with the happenings under discussion. In other cases and generally, as far as it is practicable, circumstances having relevance to the issue of responsibility will be dealt with later.
>
> At the beginning of the Pacific War in December 1941 the Japanese Government did institute a system and an organization for dealing with prisoners of war and civilian internees. Superficially, the system would appear to have been appropriate; however, from beginning to end the customary and conventional rules of war designed to prevent inhumanity were flagrantly disregarded.
>
> Ruthless killing of prisoners by shooting, decapitation, drowning, and other methods; death marches in which prisoners including the sick were forced to march long distances under conditions which not even well-conditioned troops could stand, many of those dropping out being shot or bayonetted by the guards; forced labor in tropical heat without protection from the sun; complete lack of housing and medical supplies in many cases resulting in thousands of deaths from disease; beatings and torture of all kinds to extract information or confessions or for minor offences; killing without trial of recaptured prisoners after escape and for attempt to escape; killing without trial of captured aviators; and even cannibalism: these are some of the atrocities of which proof was made before the Tribunal.
>
> The extent of the atrocities and the result of the lack of food and medical supplies is exemplified by a comparison of the number of deaths of prisoners of war in the European Theater with the number of deaths in the Pacific Theater. Of United States and United Kingdom forces 235,473 were taken prisoners by the German and Italian Armies; of these 9,348 or 4 per cent died in captivity. In the Pacific Theater 132,134 prisoners were

taken by the Japanese from the United States and United Kingdom forces alone of whom 35,756 or 27 per cent died in captivity."

On torture the judgment has this to say:

"The practice of torturing prisoners of war and civilian internees prevailed at practically all places occupied by Japanese troops, both in the occupied territories and Japan. The Japanese indulged in this practice during the entire period of the Pacific War. Methods of torture were employed in all areas so uniformly as to indicate policy both in training and execution. Among these tortures were the water treatment, burning electric shock, the knee spread, suspension, kneeling on sharp instruments and flogging."

Dealing with food and clothing the judgment states:

"The Japanese Government promised early in 1942 to take into consideration the national customs and racial habits of the prisoners of war and civilian internees in supplying them with food and clothing. This was never done. Regulations in force at the time this promise was made required that camp commandants in supplying prisoners of war and internees with food and clothing should be guided by the Table of Basic Allowances governing the supply of the Army. The commandants were authorized to determine the amount of the allowance to be made to the inmates of the camps but were directed to make such determination within the limits prescribed in the Table of Allowances. These Regulations, insofar as they affected diet, were interpreted as forbidding the prisoners and internees sufficient food, even when other food existed in the vicinity of the camps. This rule was followed even when the inmates of the camps were dying in large numbers from malnutrition. The amount and kind of food prescribed by the Table of Allowances was not materially changed during the war, except to reduce the amount prescribed, although it soon became apparent to those in command that due to different national dietary customs and habits, the prisoners and internees could not subsist on the food supplied. On 29 October 1942, orders were issued to all camp commandants that "in view of the consumption of rice and barley by workers in heavy industries in Japan," the ration for prisoners of war and civilian internees who were officers or civil officials should be cut so as not to exceed 420 grams per day. In January 1944, this ration of rice was further cut to a maximum of 390 grams per day. As the inmates of the camps began to suffer from malnutrition, they fell easy prey to disease and were quickly exhausted by the heavy labour forced upon them. Regardless of this, the commandants of the camps enforced Tojo's instructions that those who did not labour should not eat and still further reduced the ration and in some cases withdrew it entirely from those who were unable to labour because of illness or injury.

The Regulations provided that the prisoners of war and civilian internees should wear the clothing formerly worn by them, that is to say the clothing they were wearing when captured or interned. This Regulation was enforced by the camp commandants with the result that in many of the camps the inmates were in rags before the war ended. It is true that the Regulation allowed the camp commandants to lend certain items of clothing in cases where the clothing formerly worn by the prisoners or internees was unfit, but this appears to have been used only in rare cases."

On medical supplies the judgment states:

"The Japanese Army and Navy were required by their regulations to keep on hand and in storage a supply of medicine and medical equipment sufficient for one year's use. This was done in many instances by

confiscating Red Cross drugs and medical supplies, but the supplies were kept in storage or used mostly for the benefit of Japanese troops and camp guards. The prisoners of war and civilian internees were rarely furnished medicines and equipment from these warehouses. At the time of surrender, large quantities of these supplies were found stored in and around prisoner of war and civilian internee camps in which prisoners and internees had been dying at an alarming rate for lack of such supplies.

Suzuki, Kunji, who served as a staff officer of the Eastern Military District on Honshu Island under Dohihara and other Commanders, testified before this Tribunal. Suzuki admitted that he authorized chiefs of camps and guards at the detention camps in his district to confiscate Red Cross parcels intended for prisoners of war. The evidence shows that this was common practice at the camps located in Japan as well as in Japan's overseas possessions and in the occupied territories. Incidentally Suzuki also admitted that he knew that his guards were beating and otherwise ill-treating the prisoners.

Failure to afford adequate or any medical supplies to prisoners of war and civilian internees was common in all theatres of war and contributed to the deaths of thousands of prisoners and internees."

In commenting on the submission which had been made by counsel for the defence that the insufficiency of food and medical supplies in many of the instances established was due to disorganization and lack of transport facilities resulting from the Allied offensives, the judgment states:

"Whatever merit that argument has in its narrow application it loses effect in face of the proof that the Allied Powers proposed to the Japanese Government that they should send, for distribution among prisoners of war and internees the necessary supplies; which offer was refused by the Japanese Government."

One way of attempting to conceal the maltreatment of prisoners of war and internees was in hampering and obstructing the Protecting Power. This is made clear in the following passage from the judgment:

"The Japanese Government condoned ill-treatment of prisoners of war and civilian internees by failing and neglecting to punish those guilty of ill-treating them or by prescribing trifling and inadequate penalties for the offence. That Government also attempted to conceal the ill-treatment and murder of prisoners and internees by prohibiting the representatives of the Protecting Power from visiting camps, by restricting such visits as were allowed, by refusing to forward to the Protecting Power complete lists of prisoners taken and civilians interned, and ordering the destruction of all incriminating documents at the time of the surrender of Japan."

After meeting with continuous evasions on the part of the Japanese Government on the subject of visits to camps, matters came to a head in the following Note, dated March 30, 1944, from the Swiss Minister to Foreign Minister Shigemitsu:

"You know that I am not satisfied with my activities as representative of foreign interests in Japan. The results do not correspond to the efforts. I can see this in a concrete fashion as shown by the statistics of my services and requests which have been made by my Government at the request of the Governments who have confided their interests in us. I desire to confine myself for the moment to my requests to visit prisoner of war camps. Reviewing my requests made over more than two years, I find that from 1 February 1942 to 15 March 1944, I have intervened 134 times in writing. These 134 notes have brought exactly 24 replies from

the Foreign Ministry. Most of these replies are either negative or forward to me decisions made by competent authorities. I have received three replies in nine months."

The judgment goes on to state that in the few cases where the representatives of the Protecting Power were allowed to visit detention camps, the camps were prepared for the visit and the visits were strictly supervised, in spite of repeated objections by the Protecting Power.

On the subject of mail the judgment states:

"The mail which prisoners of war were allowed to send was restricted almost to the point of prohibition. Prisoners in some camps, such as those at Singapore, were told by their guards that unless they reported favourably on conditions at the camp their cards would not be sent. This appears to have been the general rule."

Secretary of State Cordell Hull, in speaking of the treatment of prisoners of war in Japanese hands, stated:

"According to the reports of cruelty and inhumanity, it would be necessary to summon the representatives of all the demons available anywhere and combine their fiendishness with all that is bloody in order to describe the conduct of those who inflicted those unthinkable atrocities on the Americans and Filipinos."

In its judgment the Tribunal observed that the vigour of this language was fully justified by the evidence given before the Tribunal.

The British hand-book also indicates that maltreatment of internees in the camps administered by the Japanese was general in its character. The following excerpts make this clear:

"While the Conventions were naturally not perfect and while their observance by the enemy was, as will be seen later, very far from perfect, it is beyond all doubt that, thanks to them and to the unremitting labours of the representatives of the Protecting Powers whose rights are defined in Article 86 of the Prisoners of War Convention, the lot of prisoners of war was, generally speaking, more bearable than in the 1914-18 war. This statement must, however, be strongly qualified as regards the Japanese Government. The latter, while professing their intention to observe the Conventions, in actual fact did exactly what they thought fit, and in all matters what they thought fit differed entirely either from the letter or the spirit of the Conventions." (p. 7).

"In areas under Japanese administration before the existence of a state of war, British subjects did not at first suffer undue hardship, but in territories occupied during and after December 1941 there was no attempt to conform to civilized standards, either in the case of prisoners of war or of civilians. The most that can be said is that, as compared with prisoners of war, civilian internees in some areas were relatively fortunate in that, if they were badly treated, this was due to callous indifference rather than to a policy of studied brutality on the part of the Japanese officials and camp authorities. Like the Gestapo, however, the Japanese gendarmerie were a law unto themselves and their interference in camp affairs was, with good reason, dreaded by all." (p. 126).

"All neutral representatives either had to be withdrawn or were no longer recognized, and we rightly deduced that the Japanese authorities would not allow neutral observers to see conditions in the occupied countries, and in particular in prisoner of war and civilian camps because the conditions were not fit to be seen." (p. 126).

"Although we never ceased our efforts to induce the Japanese to implement their promises and apply the Prisoners of War Convention, it would be futile to record in detail the continuous breaches which occurred, seeing that the Japanese deliberately and consistently ignored the general humanitarian principles on which the Convention is based." (p. 128).

"The observance of Articles 2, 3 and 4 of the Convention was, in general, a mockery. When expedient, though not otherwise, prisoners were tortured to induce them to reveal information. This was part of the system and was not due to casual brutality." (p. 128).

"Article 7, dealing with the evacuation of prisoners of war from the fighting zone, was ignored, the Japanese siting transit and permanent camps where they most needed labour and without any regard to the safety of the prisoners." (p. 128).

"Punishment for minor offences was out of all proportion and was carried out in the most arbitrary and barbarous manner. Attempted escape was almost always punished either by death or by life-sentences." (p. 129).

"The most noticeable characteristic of the Japanese authorities in Hong Kong was their callous indifference to the suffering of both civilian and military prisoners. In addition prisoners were subjected to physical violence, such as face-slapping, beating over the head and the more brutal forms of punishment for infringement of regulations." (p. 140).

"There were eight main camps in the Netherlands East Indies and conditions in all were much the same, any differences being due to the personality of the camp commandant and the Japanese guards. In Borneo the treatment was especially brutal and the prisoners were half-starved. This only became known when the island was re-occupied. Despite great overcrowding, accommodation was the most satisfactory feature of the camps, as the prisoners were generally housed in empty barracks which had some degree of proper sanitation. No bedding was provided, but the prisoners had been able to keep some of their own blankets. Officers were housed separately, but received few special privileges and were liable to be slapped by their guards for petty offences. The ration scales of other ranks were lower than for the Japanese and they were constantly slapped, beaten over the heads with sticks and punished in brutal and degrading ways. Work was compulsory and the most menial tasks were allotted to Europeans in order to humiliate them. Disobedience or attempted escape was punishable by death." (p. 146).

"A particularly shocking instance of calculated Japanese brutality was the moving of some 3/4,000 British prisoners in Borneo in conditions which can truly be described as those of a "death march". Of these unhappy men a bare handful survived." (p. 147).

"The first report on which action was taken was from an escaped prisoner and concerned the conditions in Rangoon Gaol. A protest through the Protecting Power in September 1942, evoked a flat denial from the Japanese of the truth of the report. As the fighting continued the accounts which we received of the brutality, the tortures and the executions carried out by the Japanese soldiery on able-bodied and wounded prisoners of war alike, medical personnel, officers and men of all races, European, Indian and African, were sickening." (p. 148).

"Regulations (in Japanese camps for civilians in the Philippines) were arbitrarily enforced by junior officers, complaints were ignored by senior officers and there were cases of deliberate and barbarous brutality on the part of camp staffs and guards. The general policy was to make internment

as unpleasant and intolerable as possible. The treatment was in every respect consistently bad, and escapers were, if recaptured, put to death." (p. 152).

The tone of the British hand-book, issued as it was five years after the end of the war, carries the conviction of its reliability. The statements quoted from it in addition to receiving support from those quoted from the judgment of the International Military Tribunal for the Far East, receive widespread support from other publications. While it is probably true that there were some inmates of internment camps administered by the Japanese, both civilians and prisoners of war, who did not suffer maltreatment, at least to an extent serious enough to justify a claim for compensation against enemy assets, and while it is also true that there were considerable variations of conditions as between the camps, conditions in Japan, Formosa, Korea and Manchuria being in general much better than those in the southern areas occupied by the Japanese forces (British hand-book, p. 137), it can be said with a fair approach to accuracy that all internees in camps operated by the Japanese were maltreated. For this reason it seems to me that if maltreatment of itself should give rise to a valid claim for compensation out of the War Claims Fund it would be a mistake to require a Commissioner to take evidence in every individual case of alleged maltreatment in the Japanese-administered camps in the Far East. The proceedings would consume an immense amount of time and while some differentiation might be made between the amounts approved for claimants the weight of advantage is, in my opinion, in favour of what may be called automatic awards made up on a *per diem* basis. As, however, there is no satisfactory evidence of general maltreatment outside of the internment camps in the Far East while operated by the Japanese, or either inside or outside of the internment camps administered by Germany or Italy (except certain concentration camps to be mentioned later) this principle in my view should apply in the Far East only to Japanese-operated camps and only for the periods during which they were operated by the Japanese and in Europe should apply only to the concentration camps.

With regard to the camps administered by the German and Italian authorities the following citations from the British hand-book are illuminating:

"Although much unnecessary suffering was caused, both deliberately and by chance, to British civilians who either chose or were compelled to remain in enemy or enemy-occupied territories in Europe during the war, their lot as compared with that of other Allied nationals and of British nationals in the Far East was fortunate. This was partly due to the untiring energy of both the United States and the Swiss Governments as Protecting Power and to the admirable welfare work carried out by the International Red Cross Committee, often in the face of considerable difficulties, but chiefly to the fact that, despite the existence among our enemies of many ruthless and brutally callous individuals, the great majority of the officials with whom British subjects came into contact had reached the same standard of civilization and still retained the same humanitarian outlook as ourselves. This fact not only secured, on the whole, spontaneously reasonable treatment for our people, but also meant that the German and Italian Governments took a keen interest in the fate of their own nationals in British territory as compared with the calculated indifference shown by the Japanese. Therefore, despite a number of shocking examples of brutality such as we should not have expected from civilized nations, the Germans, the Italians and their satellites, generally speaking, knew as well as we did what was meant by the humane treatment of civilians, by properly balanced rations, reasonable living accommodations and adequate medical services. This

did not always mean that they applied their knowledge, but at least we were not considering in Europe such matters on a different plane as we had to do in our dealings with the Japanese." (pp. 79 and 80).

"The treatment of British internees in German internment camps was not on the whole bad." (p. 82).

Moreover, while there may have been random and isolated instances of maltreatment of persons in internment or detention by the German and Italian authorities, the files certainly do not indicate that this condition obtained generally if relatively minor violations of the Geneva Convention are left out of account. It seems to be true that the rations issued in Germany to prisoners of war were not equivalent to the rations of any category of German troops (British hand-book, p. 18) and a finding to this effect (like a similar finding as to Italy) was made by the United States War Claims Commission. (See First Semi-Annual Report to the Congress for the period ending March 13, 1950, p. 47). However, the food supplied is said to have been on the scale of rations drawn by German civilians and I do not think that for purposes of claims for compensation from the War Claims Fund limitation to this scale should be regarded as maltreatment. In the case of camp installations the requirements of Article 10 of the Geneva Convention were never fully met by Germany, but the British hand-book points out that "probably they never could be by any belligerent, seeing that it is a question of housing, usually at relatively short notice, large bodies of men on a scale comparable to the conditions in which the detaining power's own troops are housed." (p. 18). The British hand-book states that "the Italians, broadly speaking, tried to be correct and kind and their failures were as a rule due to inefficiency and procrastination." (p. 18).

For these reasons I think there should be no presumption that persons interned or detained were maltreated except where they were interned in camps in the Far East and then only during the period when such camps were operated—that is administered or effectively controlled—by the Japanese, or where they were interned in certain concentration camps in Europe. Any person claiming for maltreatment elsewhere or not within the period mentioned should be required to prove that he suffered maltreatment.

It is now necessary to deal more fully with the concentration camps in Europe. The definition of internment camps suggested above includes concentration camps. But the words "concentration camp" have a much more sinister significance than the words "internment camp". They ordinarily mean a camp established to contain persons not because they are enemy aliens or prisoners of war but for other reasons relating to race or political offences. In enemy and enemy-occupied territories there were some of these camps. I recommend that a list of concentration camps where continuous and serious brutality and maltreatment of inmates was carried on be compiled (on evidence which I have not been able to obtain completely enough to enable me to compile the list) with the periods during which it was carried on and that the presumption of maltreatment and the *per diem* award system applicable to Japanese-operated camps be applied to the concentration camps on such list and for the periods there appearing. The only concentration camps of which I have any knowledge that should in my view be listed are those controlled and directly administered by Die Schutzstaffeln Der Nationalsocialistischen Deutschen Arbeiterpartei, commonly known as the S.S. Maltreatment in concentration camps administered by the S.S. was fully considered by the International Military Tribunal which sat at Nuremberg, Germany, to try German Major War Criminals. At this trial the S.S. was indicted as a criminal organization under Article 9 of the Charter defining the constitution, jurisdiction and func-

tions of the tribunal and found guilty. In arriving at its findings the tribunal took into account the activities of the S.S. in connection with concentration camps. An excerpt from the judgment on the S.S., dealing with the administration of concentration camps, reads as follows:

> "From 1934 onwards the SS was responsible for the guarding and administration of concentration camps. The evidence leaves no doubt that the consistently brutal treatment of the inmates of concentration camps was carried out as a result of the general policy of the SS, which was that the inmates were racial inferiors to be treated only with contempt. There is evidence that where manpower considerations permitted, Himmler wanted to rotate guard battalions so that all members of the SS would be instructed as to the proper attitude to take to inferior races. After 1942 when the concentration camps were placed under the control of the WVHA they were used as a source of slave labour. An agreement made with the Ministry of Justice on 18th September, 1942, provided that anti-social elements who had finished prison sentences were to be delivered to the SS to be worked to death. Steps were continually taken, involving the use of the Security Police and SD and even the Waffen SS, to insure that the SS had an adequate supply of concentration camp labour for its projects. In connection with the administration of the concentration camps, the SS embarked on a series of experiments on human beings which were performed on prisoners of war or concentration camp inmates. These experiments included freezing to death, and killing by poison bullets. The SS was able to obtain an allocation of Government funds for this kind of research on the grounds that they had access to human material not available to other agencies."

There were some instances of Canadians being placed in concentration camps during the war. It is believed that a few Canadian civilians were sent to concentration camps when they should have been sent to ordinary internment camps. Likewise it may be established in a few cases that recaptured prisoners of war (members of the Canadian forces) were punished by being sent to concentration camps instead of being sent back to prisoner of war camps. It seems evident that if compensation for maltreatment of persons in Japanese-operated camps should be awarded on a *per diem* basis for the periods when the camps were so operated the same treatment should be extended to persons interned in the listed concentration camps for the periods to be listed.

In general it may be said that the maltreatment by the Japanese in the Far East and in the concentration camps to be listed was continuous during the period of internment, while on the other hand, any maltreatment there may have been of persons interned or detained in Europe, except in the concentration camps to be listed, was not. It would, therefore, appear to be necessary to establish two bases for the payment of compensation. Common to both bases, however, is the principle that compensation for maltreatment is not to be based on pecuniary loss. A rational basis for compensation for maltreatment is hard to define. It must be recognized that the suffering and hardship imposed by maltreatment may not exceed, and in many cases would not equal, the hardship and suffering of members of the armed forces in action. The risks of disability and death are ordinarily less. On the other hand, the hardship and suffering of the member of the forces on the field of battle, on the sea, or in the air, is contemplated as incidental to the task which he undertakes. Maltreatment was recognized at the end of World War I as giving rise to claims for compensation. It is a ground for claim which Canada could put forward in negotiating a treaty with a defeated enemy as

one for which the defeated enemy should compensate. In my view it is, therefore, an appropriate claim to be admitted as a war claim against enemy assets in the hands of the Canadian Government.

The basis of such claim in the case of Japanese-operated camps in the Far East and in the listed concentration camps where maltreatment should be presumed to have been continuous for the reasons above given, should in my view be a *per diem* basis related to the time interned. The award to any claimant should be deemed to compensate for all maltreatment of whatever kind which the claimant suffered during the period of his internment. I have come to the conclusion that civilian internees, whether men, women or children, should be given a maltreatment award of $1.00 a day for the time interned. For reasons to be developed later this award should include any element of pecuniary loss, such as payment for food, or failure to obtain compensation for labour, which they suffered as a result of the maltreatment during the period of internment. The case of prisoners of war presents greater difficulties. It may be considered that members of the forces interned in camps should not be compensated on a flat rate *per diem* basis because this in effect would be adding to their service pay and discriminating against other members of the forces who were fighting in conditions which may be described as those of organized maltreatment. However, if the reasons for making maltreatment awards to prisoners of war as given above are valid the fact that the award is on a *per diem* basis should not be taken as indicating that it is in any sense an addition to their pay. It is merely a method of arriving at an award of compensation properly payable for maltreatment. I may add that I do not think that a moderate allowance for compensation for maltreatment effects a real discrimination in favour of prisoners of war as against those not taken prisoner. Among other considerations it may be noted that a member of the forces who was not taken prisoner could rely, by and large, on prompt and proper medical and hospital treatment and upon discharge to pension if unable to continue in the forces. These privileges were denied to prisoners of war in substandard camps. They, too, were entitled to rely on prompt and proper medical treatment and proper nourishment, but they did not get it. In any event Article 16 of the treaty with Japan recognized the propriety of making some special allowances to these prisoners. This article is as follows:

> "As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to appropriate national agencies, for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable. The categories of assets described in Article 14(a) 2(11)(ii) through (v) of the present Treaty shall be excepted from transfer, as well as assets of Japanese natural persons not residents of Japan on the first coming into force of the Treaty. It is equally understood that the transfer provision of this Article has no application to the 19,770 shares in the Bank for International Settlements presently owned by Japanese financial institutions."

It has been impossible to secure definite information as to the value of the Japanese assets in neutral and ex-enemy countries which will be available for former Allied prisoners of war and their families under Article 16 or as to the basis of distribution of these assets but it has been the position of Canada that they should be distributed on a man-day of internment basis. In any event it is reasonable to expect that some provision will be made for Canadian

ex-prisoners of war out of these assets. I therefore recommend that 75¢ a day be the *per diem* rate for maltreatment of those who were members of the armed forces and who were prisoners of war of Japan as compared with $1.00 a day for others who are eligible for *per diem* awards, but that an additional 25¢ a day be retained in the Fund in a suspense account to be used to such extent as may be necessary for the purpose of bringing the 75¢ a day up to $1.00 a day as and when the value of the benefit received under Article 16 of the treaty with Japan by any claimant is ascertained. Any balance in the suspense account not required for this purpose should be transferred to the general accounts of the Fund, and if the value of the benefit received under Article 16 in respect of the maltreatment of a member of the forces is not less than a sum equivalent to 25¢ for each day of his internment, the whole sum in the suspense account in respect of that member should be transferred to the general accounts of the Fund. If, before the time comes for making the maltreatment awards, there are any indications that the amount available under Article 16 of the treaty with Japan may exceed 25¢ per man-day of internment, the figure of 75¢ should be reduced and the figure of 25¢ should be increased, but the result of inquiries to date indicates that the amount available will not be more than 25¢ per man-day and may be considerably less.

I do not think the fact that prisoners of war were in receipt of pay and allowances and that their time of internment counted for gratuities and rehabilitation benefits has any real relevancy. Members of the forces were captured in the Far East because they were sent there. Civilians were interned because for reasons of their own they lived in that part of the world. The principle that compensation to civilians for mere internment is not recoverable while at the same time members of the forces should be paid during their period of internment is well-established and settled.

In addition to the *per diem* payment which prisoners of war should receive for maltreatment they are, of course, pensionable for any disability received from maltreatment but should not be entitled to any compensation other than the *per diem* rate in respect of the period during which they were in the camps. As in the case of civilians the *per diem* award should cover the pecuniary loss, if any, such as failure to obtain compensation for labour, which they sustained as a result of the maltreatment during the period of internment.

The period of internment for purposes of computing the *per diem* award should include the period of transit between one Japanese-operated internment camp and another and between one concentration camp and another. It should also include the period after September 2, 1945, if any, during which internment in Japanese-operated camps continued.

I should, perhaps, say a word as to the basis of the selection of $1.00 a day as the appropriate figure. The number of man-days of prisoners of war internment in the Far East was stated in the House of Commons on May 19, 1950, to have been 2,113,000. About 1,750 Canadian prisoners of war were interned. Nearly half as many civilians were also interned in the Far East but probably for shorter periods on the average. Assuming that $1.00 a day were paid in respect of all interned prisoners of war the cost to the Fund would be approximately $2,100,000. And assuming not half but a third of this sum is paid in respect of civilians the cost to the Fund would be another $700,000 making $2,800,000 in all. If this sum is discounted by $600,000 because of deaths in cases where there are no dependents or none eligible for awards and because of benefits to be received under Article 16 of the treaty

with Japan, the *per diem* awards for maltreatment in the Far East will total $2,200,000 and I would expect the drain on the Fund for *per diem* awards for maltreatment in the Far East to be something of this order.

As the amount of assets of Japanese origin in the hands of the Government is only about $3,800,000 and as there is a very large number of claimants against the Fund for property losses in the Far East, many of these claimants being in poor or even distressed circumstances, having in some cases lost practically all they possessed as a result of Japanese aggression, it would appear inappropriate to set up a valid claim against the Fund for maltreatment on a *per diem* basis in a sum in excess of the amount mentioned, particularly as the total of the claims for pecuniary loss from death and personal injuries arising from maltreatment may be large and there may be many claims for maltreatment on the lump sum basis to be discussed later as distinguished from the *per diem* basis. True, the assets of Japanese origin and those of German origin will be pooled, but the relationship between total claims for losses in the Far East and the assets obtained from Japan should not be lost sight of. To pay out more than about 60 per cent of the total Japanese assets held by the Government in maltreatment awards would, in my judgment, be hardly defensible, there being so many claims for actual pecuniary losses on the files and so many more certain to be made. But, the application of from 50 to 60 per cent of the assets of Japanese origin to awards for compensation for the grievous maltreatment which took place in Japanese-operated camps would not seem to be an inappropriate use of moneys in the War Claims Fund.

As indicated above a different basis of compensation should be adopted with regard to awards for maltreatment elsewhere than in the Japanese-operated camps in the Far East and the listed concentration camps. The basis should be different in two respects: first, with regard to the proof of maltreatment to be required by the Commissioner (as indicated above such proof should be required in every case); and secondly, as to the seriousness of the maltreatment which should be considered as essential to an award. If some test of seriousness is not laid down a Commissioner may be confronted with a great variety of claims based on minor infractions of the Geneva Convention; and having no standard to guide him his task in making an equitable distribution of compensation will be impossible to perform. It seems to me that, excepting the automatic awards above mentioned, maltreatment awards should be made only in cases where incapacity to work resulted from the maltreatment and such incapacity subsisted after liberation. This was the test applied by the Sumner Commission as applicable to maltreatment claims by prisoners of war. (See report of the Sumner Commission as quoted by Mr. Errol M. McDougall in his memorandum on Maltreatment of Prisoners of War, dated January 13, 1932, p. 6). The relevant part of the Sumner Commission's decision is as follows:

> "III. that in order that damages suffered by a prisoner of war as a result of maltreatment should give rise to a claim for reparation, it would be necessary
>
> (*a*) that incapacity to work should have been the consequence of maltreatment.
>
> (*b*) that such incapacity for work should have subsisted after liberation."

This substantially was the test adopted by Mr. McDougall in Canada. The Commissioner should satisfy himself, first, that the maltreatment was of sufficient seriousness to be compensable at all, and secondly, that it met the Sumner Commission test. If satisfied that these two conditions are met the Commissioner should then recommend a lump sum award appropriate to the

maltreatment. Bearing in mind the maximum award possible for maltreatment in Japanese-operated camps in the Far East where the maltreatment in addition to being continuous was in many cases terribly severe, the Commissioner should not in any case recommend a maltreatment award greater than $1,400.00, this being approximately the maximum that any internee can receive on a *per diem* basis for maltreatment in the Far East. The lump sum awards in many, if not most or all, cases should be less than this sum and in most cases should probably be very much less as maltreatment will probably in most cases be found to have been sporadic or of short duration.

The fact should not be overlooked that the maltreatment awards to civilians both in respect of maltreatment in the Far East and elsewhere will be without prejudice to claims for compensation for pecuniary loss resulting from the maltreatment in respect of the period after liberation from the camps. If civilian claimants are able to establish that as a direct consequence of the maltreatment they have suffered pecuniary loss of any kind in respect of the period after their liberation, either by loss of earnings after liberation down to the time of adjudication or of future earning capacity or otherwise they will be entitled in addition to their maltreatment awards to compensation on the basis set out in the section of the report above dealing with compensation for personal injuries.

One further question remains. Should the maltreatment awards survive for the benefit of estates or dependents in the case of death? As against allowing them to do so is the fact that they are not to be based upon pecuniary loss but are in the nature of *solatium* to the persons maltreated and highly personal in character. But in favour of allowing them to survive are the following considerations: (a) the delay in compensation after liberation; and (b) the fact that there were many cases of expenditures made or incurred or of uncompensated labour in internment which cannot for reasons to be given be compensated out of the Fund. On balance, I think the awards should survive, but as the maltreatment awards will be compensation for something other than pecuniary loss, that they should survive for the benefit of dependents as defined below rather than for the benefit of estates. A reasonable provision would, in my opinion, be that compensation for maltreatment claims shall, in case of death of persons who would be entitled if alive, be payable only to or for the benefit of the following persons:

1. the widow or dependent husband, if there is no child or children of the deceased;

2. the widow or dependent husband and child or children of the deceased, one-half to the widow or dependent husband and the other half to the child or children of the deceased in equal shares;

3. the child or children of the deceased in equal shares if there is no widow or dependent husband; and

4. the dependent parent or parents (in equal shares) if there is no widow, dependent husband or child.

It should be borne in mind that in cases where maltreatment caused death there may be valid death claims in addition to maltreatment claims. In any case where these two classes of claims co-exist the accrual of the benefits of the maltreatment award to widow, husband, child, children, parent or parents as the case may be, should be taken into account in determining the pecuniary loss which he, she, or they, have suffered from the death, compensation for the death in such case being upon the balance of gains and losses resulting from the death. This principle is explained above in the section dealing with personal injury claims.

Similarly, where maltreatment caused death but there is no valid death claim because the deceased was a prisoner of war and pension is payable on account of his death, the maltreatment award payable to any dependent should be limited to the amount by which it exceeds the value of the pension of that dependent capitalized as at the date from which pension was payable. Otherwise there would be a discrimination against claimants having civilian claims.

Claims for Property Losses

Many claims have been and will be made for compensation for loss of and damage to property. These claims, like those for compensation for death and personal injuries, should only be allowed to the extent that the loss or damage was directly caused by war operations as defined below. Moreover, no compensation should be paid for damage which is too remote by the standards applied in the civil courts. There should be no assumption, however, that the other principles applied in the courts in the assessment of damages should govern the disposition of war claims, for the reasons given below.

An interpretation of the word "property" as contained in the terms of reference is necessary. "Property" is used in a wide variety of senses. It is used colloquially to denote physical things owned by individuals and certain rights the individual has to receive payments of money, for example, "money in the bank". In the latter case the individual really does not own any money, but is entitled to receive payment from the bank. The widest meaning that may be given to property is that it includes all rights of value vested in an individual whether they are rights to physical things, such as lands or chattels, or rights with respect to debts, shares, bonds, promissory notes, patents, and so forth. At first glance it would appear that the terms of reference may have been intended to denote merely physical things that are property, because I am asked to inquire into the "loss of or damage to" property. The implication from these words is a physical loss or damage. The conclusion I have reached, however, is that property is to be given its widest meaning as including all rights having pecuniary value. It means moveable and immoveable property, whether tangible or intangible and all rights or interests to or in any kind of property. I attribute this meaning to it because it gives effect to the underlying purpose of the inquiry, namely, to ascertain the losses to individuals arising out of the war for which compensation is to be paid out of the War Claims Fund. Loss may result from the sequestration of rights, such as debts, shares, and so forth, quite as much as from destruction of tangible physical things.

Having reached this conclusion I found it necesary to give a corresponding interpretation to the words "loss of or damage to". There is no difficulty in applying these words where the property is of a tangible nature. In the case of so-called intangible property, debts and other rights of a valuable nature, I interpret these words as implying a divesting of the right. In such case, clearly the right has been lost. In this respect some confusion may arise because, in fact, there is not a clear distinction between tangible and intangible property. From a strictly theoretical legal point of view all property consists of rights. The subject of the right may or may not be a physical object. The type of property usually referred to as tangible is where the object of the right is a physical thing such as a house. In the case of so-called intangible property, the object of the right is not a physical object. It may be merely a prospective payment, for example, the right may be to payment of a debt. Intangible property may, however, have a tangible aspect. A debt may be evidenced by a document which is a tangible object. Similarly, the rights of shareholders in companies, or of bondholders or other kinds of

rights, may be evidenced by certificates. Moreover, such a document may be the sole evidence of the title to the right, for example, a bearer bond. The bond evidences a right to payment from the debtor company. It derives its value from the promise to pay, and it is therefore the promise to pay that is of value. If, however, the bearer certificate is lost, then the owner is divested of his right. Loss of or destruction of a certificate may, therefore, result in the owner of a right being divested of his right.

If "property" and "loss of or damage to" it are to be given the wide interpretations I have concluded they must bear, it becomes apparent that the wartime activities which may cause "loss of or damage to property" may be of two kinds. They may be of a kind that cause physical destruction of things owned, such as houses, ships, and so forth, or they may be of a kind that merely deprive the individual of a right of pecuniary value, for example, divest him of his right to claim payment of money deposited with the bank or to collect a debt owing to him. I have had to consider the nature of wartime activities operating in both of these ways which may cause losses which give rise to war claims.

I have concluded that claims for losses with respect to "property" should be admitted as war claims where the loss was caused by the following:

1. physical loss of or damage to tangible things caused by acts of actual warfare by belligerent armed forces whether army, navy or air forces, and whether those of an enemy or an ally of an enemy or Canadian or Allied forces;

2. physical loss or disappearance of tangible things caused by theft or looting in a theatre of actual warfare in a country of an enemy or an ally of an enemy or in an area occupied by an enemy or an ally of an enemy, whether the looting or theft was by members of armed forces or not, looting to be conclusively presumed where the cause of the loss or disappearance cannot be established;

3. physical loss or disappearance of or damage to tangible things caused by seizure, sequestration, confiscation or requisition by the government of the country of an enemy or an ally of an enemy on the ground of the enemy character of the Canadian owner (hereinafter referred to as wartime special measures) or by the armed forces of any belligerent in a theatre of actual warfare in a country of an enemy or an ally of an enemy or in an area occupied by an enemy or an ally of an enemy and by the failure of those taking the things to return them to the Canadian owner after the war or to take due care of them before their return; or

4. the divesting of rights having pecuniary value by wartime special measures of an enemy government on the ground of the enemy character of the Canadian owner where such rights have not been revested in the Canadian after the war.

I include in tangible things currency and certificates or other evidence of rights where the possession of the certificates is the basis of the right, for example, a bearer bond.

The causes set out above (i.e. in the parts of paragraphs 1, 2 and 3 after the words "caused by" in each case and in the whole of paragraph 4) will occasionally be referred to below as war operations. The claims for losses of money or rights to payment of money will be referred to as money claims and the claims for other losses of property, including claims for damage to property, as physical assets claims.

The admission of claims for the losses set out in 1, 2, 3 and 4 above in my opinion gives proper effect to the considerations I mentioned earlier. I have already indicated the reasons why I consider that acts of actual warfare causing deaths or personal injuries should give rise to war claims. The same

considerations apply to losses of or damage to property. I include losses resulting from "looting" because while looting is not an act of actual warfare by belligerent forces, and much looting was done by civilians, looting springs so obviously from the conditions created by actual warfare that it must be considered as a natural and ordinary accompaniment of it.

I recommend that the losses mentioned in clauses 3 and 4 be admissible for compensation because they arise from acts which are really acts of war, are of the type of losses which fall only on specific individuals and not on the community at large, and meet the other requirements for admissible claims.

One class of exceptions to the losses enumerated above as compensable should, however, be established. These losses as enumerated would include certain losses of personal belongings by members of the Canadian armed forces lost, stolen or looted. I am informed that the understanding has always been that members of the armed forces, if they took with them personal belongings on service, did so entirely at their own risk and in my opinion losses of such belongings should not be compensable out of the War Claims Fund.

Many claims have been made for compensation for loss of or damage to property from causes other than those I have enumerated. If an attempt is made to go beyond war operations as the cause of loss it will be impossible to fix a dividing line between special losses and those common to the whole community or large sections of it. It is essential that the loss must have arisen from war operations and not merely from the existence of a state of war. This distinction was emphasized after World War I by the Sumner Commission (report of January 22, 1923, p. 12) in the following words:

> "Again the Commission have felt bound to apply the legal rules as to remoteness of damage and particularly to disallow losses which arise only from the existence of a state of war, where the liability to loss is common to all Your Majesty's subjects though in the particular case it may have fallen more heavily on the claimant than on others."

The Canadian Commissioners frequently declined to allow losses arising only from the existence of a state of war. The following quotation from the decision of Commissioner Friel in Case 1457, *re Canada Steamship Lines, Limited,* Reparations, Vol. II, pp. 581 and 582, which has value also as bearing on the question whether war risk insurance premiums should be allowed, is only one of many references to the distinction between the existence of a state of war and war operations:

> "The claims for war risk premiums paid either on the vessels lost or other vessels will not be allowed. They are not a matter of direct damage by Germany. The claimant company put on the insurance of its own volition and in the exercise of its own discretion on account of the existence of a state of war, but the expenses are in no sense losses, damages or injuries caused by the enemy's act within the meaning of the Treaty. The expenses were not incurred to repair loss by the enemy's act, but to provide against what the claimant feared the enemy might do resulting in a loss to it. The expenses were losses to the claimant on account of the war but are not losses for which Germany could be obliged to pay; moreover, such losses were no doubt more than compensated for by increased freight rates. There is no more reason for compensation to the claimants for the war risk insurance premiums paid than there is that the advance in ocean freight rates during the war should be recovered by the persons who had to pay them.

If the terms of the Treaty could be interpreted to cover such claims, then they could be taken to include all increased living costs, increased railway freights, increased income and profit taxes; in a word, all costs or consequences of the war direct or remote, to the extent that such costs were paid or losses suffered by Canadian subjects.

I would disallow the claim for war risk insurance paid."

The problems raised by the property claims can hardly be understood unless some indication is given of the extent and variety of these claims. After the elimination of claims which appear from the files to have been made by persons who were not Canadians at the time of loss, the classes of property losses outside of Canada for which claims have been made as disclosed by the files, is indicated country by country by the following compilation. (It should be borne in mind that many claims may yet be presented and that the list which follows may be lacking in precision due to the fact that the true nature of the loss is not obvious from the files in every case and a high degree of condensation has been necessary).

Austria—Factories and machinery, hotel and stores, houses, furniture, silverware, linens, rugs, paintings, china, office furniture and fittings, automobile and boat, art collection.

Belgium—Real property, household furniture, personal effects, automobiles, accessories, machinery and equipment, miscellaneous goods, expenses of flight to Canada, salary, profits and dividends, loss of income during internment, duty on automobile, balance on bank drafts, loss of use of personal effects, storage and insurance charges, costs of transfer from storage, rents collected by the enemy, debt from firm liquidated by the enemy.

British North Borneo—Household furniture and personal effects, commercial debt where debtor is bankrupt.

Brunei—Household furnishings and personal effects.

Bulgaria—House, automobile.

Burma—Buildings and machinery, stock-in-trade, furniture and fixtures, automobile, personal effects.

Channel Islands—Furniture, rents, unauthorized repairs, income tax, legal fees.

China—House damaged by dilapidation, hospital, churches, university buildings, schools, mission property, household furniture, personal effects, automobile tires, rent, customs duties and freight, plant, machinery, equipment, merchandise, automobiles, pensions, superannuation fund, loss of employment, salaries, dividends, medical supplies and business goodwill, payments for food in internment.

Czechoslovakia—Factories and machinery, cotton mills, woollen mills, including claims for total loss, for damage and for depreciation, power station, railroad station, airport, bridges, road and factory court, farm buildings, barns, fruit trees cut down, houses, apartment buildings, office buildings, garage building, including claims for total loss and damage, merchandise, machinery, office equipment, household furniture, silverware, glassware, china, carpets, books, paintings, fruit, wagon, straw, spindles, automobiles, bales of kidskin, rentals of mill, accounts receivable, directors' fees, dividends, bank shares and other shares, bank accounts, state loans, insurance policies, securities, losses on forced sale.

Danzig—Apartment buildings.

Esthonia—Farm, coal importing and shipping business.

France—Château, houses, villa, including claims for total destruction, damage and dilapidation, factory damaged, damage to convent, garden and park and drainage system, household furniture and personal effects, including clothing, jewellery, silverware, wines, spirits, frigidaire, library, books, sculptures and pictures, including claims for loss, damage and deterioration for want of care, antique chest with contents, automobiles, office furniture and fixtures, photographs, sketches, deterioration of dental installations, medical instruments, cows, miscellaneous merchandise, rents, losses on devaluation of franc, expenses of removal and storage, loss of money on prepaid lease and amortization of lease, architect's fees for assessment of damage, goodwill of business, loss of income during internment, loss of profits from business, expenses of flight from France, freight on furniture shipped from France.

Germany—Apartment house, houses destroyed or damaged, factories and machinery, household furniture and personal effects, antique art, rifles, telescopes, scientific instruments, jewellery, automobiles, musical instruments, aluminum metals, office furniture and fittings, loss of machines transferred under duress, miscellaneous goods, cash, bank accounts, loss of rental revenue, loss of profits, loss of income during internment, loan to brother for operations of plant, cost of establishing claims, mortgages on houses, travellers' cheques, clearing work, dismantling work and transfer of debris, financial losses caused by operations under a lease and sales agreement imposed by the German Government in 1942, financial losses suffered under a retransfer agreement of 1948, loss due to forced post-war restitution of machines purchased from manufacturers in countries occupied by Germany.

Greece—Aluminum plant, hotel and furnishings, villa, houses and barns, including equipment such as electric plants, with claims for loss for wear and tear owing to enemy occupation, retail shops, household furniture and personal effects, automobiles, jewellery, wheat, olive oil, olives, raisins and other merchandise, ore stocks, cash, bonds, income from concession, rents, cost of passage.

Hong Kong—Houses destroyed or damaged, factory looted, household furniture and personal effects, automobiles, office equipment, steam launch, brake lining and clutch facings, coconut oil, canned tuna fish, coffee, coal, cloth, wines and spirits, tea, hospital instruments, clothing, bonds and share certificates, proportion of rent and servants' wages (apartment requisitioned by Government), cash, rent and taxes for office sub-let to Government, salaries, special expenses for unloading goods, gold coins and notes in safety deposit boxes, bank interest charges, cost of repairs due to looting, expenses of trip to Canada, funds borrowed from Canadian Government, bank accounts liquidated by Japanese, account receivable from firm which cannot be traced, loss of deposit due to inflation.

Hungary—Loss of or damage to houses, farms, barns, agricultural implements, wine-presses and wine, vineyard, office buildings, personal belongings and household effects, hardwood veneers and lumber, jewellery, rugs, oxen, wagon, automobiles, horses, riding equipment, oats and hay.

Indo-China—Damage to mining exploration business and shoe factory and machinery and loss of household effects, merchandise, machine tools and spare parts, unspecified expenses.

Indonesia—Household furniture and personal effects, automobile, jewellery, brake linings, gin, trade debt where firm cannot be traced, interest and dividends on shares, fees for registration of passports.

Italy—Damage to residential houses, villas, and other dwellings, farm buildings, surrounding walls and gardens, vineyards, olive groves, poultry yard, hayloft, agricultural lands, fruit trees and fruit, irrigation ditches, crops and soil, dilapidation to religious college buildings and interior, and damage to office buildings, loss of or damage to industrial buildings, shops, roads, railway, tracks and land, iron ware, cable way, motors and equipment, workshop equipment, machinery, loss of or damage to household effects and furniture including clothing, fur coats, linen, jewellery, silverware, cutlery, chinaware and porcelain, library books, pictures (oils, watercolours, and etchings), cut glass ware, antiques, works of art, sculptures, religious objects, ornamental objects, bronzes, oriental rugs, carpets, curtains, lift vans, trunks and cases of personal effects, trousseau, farm equipment and implements, wine-presses and wine, cattle, hydraulic motor plant on farm, automobiles, auto parts, tires and tubes, miscellaneous merchandise, yacht, metals, fuels, lubricants and explosives, shoe making machinery, shoes, leather, pressed cork, postal savings certificates seized by Italian Custodian, subrogation claims in respect of confiscation by the Italian Government of sundry cargoes, cash both lire and Canadian currency, payments for food in internment, rent held by sequestrator, charges for storage and handling of furniture, financial losses due to non-payment of price integration quota for bauxite sold during the war, financial losses during sequestration, expenses and charges of sequestration management, expenses of establishing claim, cost of recovery of stolen materials, dismantling and reinstallation charges.

Japan—Factories, houses and garage, monastery (dilapidation), church property (destruction and depreciation of buildings), office buildings, perpetual lease of property which was destroyed, household furniture and personal effects, including claims for loss on forced sale by Japanese, office furniture, wine, coal, mustard seed, tuna fish, automobiles and boat, loss of dividends on shares, shares sold by Japanese Custodian, trade debt against firm which cannot be located, cash deposit, bank balance, box of Chinese coins, Canadian funds confiscated by Japanese.

Malaya—Damage to shoe and other factories and to rubber estate, business liquidated by the Japanese, household furnishings and personal effects, automobiles, brake linings, canned pineapple, labels, natural rubber, office furniture and equipment, travelling expenses to United Kingdom, cash, interest and dividends on shares.

Monaco—Villa, household furniture.

Netherlands—Shoe factory, machinery, office furniture, merchandise, raw materials, rubber, chemicals, personal belongings and household effects, silverware, accounts and other moneys collected by the German Custodian.

Norway—Miscellaneous goods, prepaid rent.

Philippine Is.—Business of telephone company liquidated by Japanese (claim by shareholders), household furniture and personal effects, office furniture and fittings, automobile, flour, drugs, payments for food in internment.

Poland—Apartment block, office furniture and fittings, miscellaneous goods, bank accounts, bonds, coins in safety deposit box, prepaid rent.

Roumania—Loss of or damage to oil drilling machinery and equipment, oil, oil royalties, stock-in-trade, securities, cash and gold coins, houses, rentals, agricultural equipment, personal belongings and household effects.

Thailand—Personal effects, bank account (loss due to currency depreciation).

Yugoslavia—House, household furniture and personal effects, merchandise, manuscripts.

High Seas—Subrogation claims by insurance companies for payments made in respect of lost ships and cargoes, lost cargoes, lost personal belongings or household effects, vessels purchased in replacement of vessels lost, loss of net earnings or profits on lost vessels, lost vessels, financial losses due to diversion of Allied ships due to outbreak of war or to issuance of Government's orders, such as loss on resale of cargoes, or cable, cartage, loading, unloading, landing or storage charges, or depreciation in value of cargoes, loss of goods already paid for owing to goods having been on an enemy ship at time of outbreak of war, war risk insurance premiums, repatriation of crew surviving from sunken vessel, hospital fees and clothing for destitute passengers, calls, cables and air mail postage in connection with sinking of vessel.

A number of categories of claims for alleged property losses may now be separately considered. It is impossible to envisage all types of property claims which may arise but the files examined indicate or suggest that the following kinds of claims may be made.

1. *Claims for loss of use of property after damage, destruction, or sequestration, or for the time when the owner was interned.*

For reasons which will be given below under the heading of "Valuation of Claims for Property Losses", it will be submitted that compensation should be based upon the principle that the real loss to a Canadian owner of property which was damaged, destroyed, or sequestrated in foreign countries arose after the war, and that in cases where property was restored to the owner after the war undamaged by war operations there was no compensable loss. The claims for loss of use of property should, therefore, not be allowed. I cannot find that the Canadian Commissioners after World War I ever allowed compensation for loss of use. The United States-German Mixed Claims Commission declined to do so. Umpire Parker of that Commission in his decision in the case of *American-Hawaiian Steamship Company* (See Whiteman, Vol. II, p. 1245) said:

> "Suffice it here to point out that (save in cases arising in German territory) the provisions of the Treaty of Berlin defining Germany's obligations to compensate for property injured or destroyed limit such obligations to physical or material damage to tangible things and do not extend them to damages in the nature of the loss of profit, the loss of use, or the loss of enjoyment of the physical property injured or destroyed."

While the decisions of the Canadian Commissioners and of the Mixed Claims Commission were based on an interpretation of treaty provisions (Treaty of Versailles or Treaty of Berlin) I think they should be applied to claims for loss of use, profits or enjoyment now being made. This view is supported by the terms of reference which direct me to make recommendations as to claims in respect of loss of or damage *to property*. The allowance of interest which will be recommended will, in some measure, offset the disadvantage which claimants suffered from being deprived of use, profits and enjoyment and will be limited to the periods during which it may be assumed that the claimant would, had his property not been lost, damaged or withheld, have received benefit from it.

2. *Claims for loss of profits of businesses carried on with or in property damaged, destroyed or sequestrated.*

These should be disallowed for the reasons given in 1 and also because the amount of profits which would have been made had there been no loss of the property is speculative and uncertain. There are many precedents both after World War I and under international arbitrations for rejecting claims for losses

of profits. For Canadian precedents see Case 1249, pp. 419 and 420, *re Mickleborough, Muldrew & Company*; Case 1450, pp. 572 and 573, *re International Petroleum Company, Limited*; and Case 1459, pp. 588 and 589, *re National Fish Company Limited,* in Reparations, Vol. II.

3. *Claims for loss of rentals of property damaged, destroyed or sequestrated.*

These should be rejected for the reasons given in 1 and 2. Rentals, however, collected by enemy authorities and not returned to the Canadian owner, should be regarded as furnishing a proper basis for a valid money claim.

4. *Claims for interest and dividends on investments alleged to have been discontinued by reason of destruction or sequestration of or damage to property.*

These should be disallowed for the reasons given in 1, 2 and 3. If, however, interest and dividends have been collected by enemy authorities and not returned to the Canadian who otherwise would have received them, they would form a proper basis for a good money claim.

5. *Claims for loss of salary or other income of any kind of which the claimant was deprived by reason of his internment or following upon the destruction or sequestration of or damage to property.*

The reasons for rejection set out in 1, 2, 3 and 4 apply to most of these claims. Claims for loss of income during internment cannot be allowed as internment is legitimate and is not the basis of an admissible claim. Such claims were consistently refused after the last war. (Case 1406, pp. 544 and 545, *re John Morrison;* Case 1419, pp. 551 and 552, *re Hyman Fishman;* and Case 1421, pp. 552-554, *re Hon. Henri S. Beland, M.D.,* in Reparations, Vol. II). Moreover, the loss is uncertain and speculative. If income after internment or after loss, damage or seizure of property accrues to the Canadian internee or owner and is collected by the enemy authorities and not returned to the Canadian, he, of course, has a good money claim. If, however, it accrues and he is not divested of it on the ground of his enemy character as a Canadian he has no claim simply because he has not received it. He must look to his debtor for payment and if his debtor had died, disappeared or became bankrupt the claimant's loss must be regarded as at best due to the existence of a state of war rather than to an act of war.

6. *Claims for losses in the value of money or money claims due to inflation.*

These should not be allowed. They are not war claims for the reasons given above. The losses are losses common to whole populations, losses which Canadians sustained as residents or investors in the enemy or enemy-occupied country along with all other residents or investors. They arise from the existence of a state of war rather than acts of war. If divested money claims were revested in their owner within a reasonable period after the war after a shrinkage in value due to inflation or depreciation their owners, therefore, have no valid claim to compensation. It follows that if there was no revesting because bank balances were liquidated or currency looted, or for some other reason, the claimant cannot claim the undepreciated value of his money or money claim.

7. *Claims for losses from the depreciation, deterioration or dilapidation of physical assets not destroyed or not wholly destroyed arising from the lack of due care on the part of enemy authorities while the physical assets were in their possession.*

If enemy authorities by wartime special measures took possession of such physical assets and returned them in a damaged condition, the damage being due to such lack of due care, the damage is war damage and should be compensated. If, however, the enemy authorities did not take possession of the assets but merely left them alone there is not a good claim for depreciation,

dilapidation or deterioration resulting from the owner's flight or internment, these not being war operations as defined above. If physical assets were taken by enemy forces or by enemy authorities on the ground of the enemy character of the Canadian owner, and damaged by lack of due care, including clearly excessive wear and tear, there is a good claim. In such case the loss or damage would be caused by war operations.

8. *Claims for loss of rights under patents, trade marks and copyrights.*

It cannot be assumed that a Canadian owner of such rights would have obtained any financial benefits from them during the war or for a reasonable time thereafter. If, however, after the war the owner has found that they have been validly transferred so that he cannot get them back, the value of them as of that date (which, as will be seen later, I would recommend be fixed as January 1, 1946) should be assessed and his claim allowed as upon a valid money claim.

9. *Claims for losses of leasehold interests or similar interests such as those of hirers of chattels.*

It cannot be assumed that such an interest would have been financially beneficial to the Canadian owner during the war. If, however, on January 1, 1946, the claimant is unable to resume enjoyment of his interest because it has been transferred or because of the war damage to or destruction of the subject matter, the value of the interest he would have had for the remaining period of the lease or similar arrangement should be assessed and his claim should be allowed for such value as a valid physical assets claim. If the claimant had prepaid the rent his claim would, of course, be greater than it otherwise would be. As will be seen later, I will recommend that physical assets be valued at pre-war values. There will be difficulties in applying pre-war valuations to leasehold interests which on January 1, 1946, would have a certain number of years to run, especially in cases where there has been damage to or destruction of the subject matter of the lease, where the valuation must be made as if it had not been damaged or destroyed, but these difficulties are not insuperable.

10. *Claims for loss of goodwill of a business carried on in premises damaged, destroyed or sequestrated.*

These should be disallowed as they are speculative and uncertain and the loss was not improbably caused by the existence of a state of war rather than by an act of war.

11. *Claims for loss of chattels, the property in which had passed to a purchaser before the loss of the chattel as a result of war operations.*

In some cases the purchaser has refused to pay for the chattels, not having received them, and the seller has presented a claim. Such claims must be disallowed, the remedy of the seller being against the purchaser.

12. *Claims for losses of mortgagees or mortgagors of physical assets which have been lost or damaged by war operations.*

The question which arises is whether claims should not be limited to those who were beneficial owners at the time of loss and whether secured creditors and similar persons should not be excluded because their liens or property interests are merely ancillary to the primary obligation of the debtor to repay the debt and because the amount of the loss is too speculative to found a claim for compensation. It would be much simpler to adopt such a rule, but I think it would be unfair to do so. If a Canadian had a mortgage on a property destroyed by war operations and the evidence shows that the

direct result of the war operations is that he has not only lost the benefit of his security but will certainly lose the amount of his investment as well, it seems to me that he should have a good claim. A Commissioner, to decide on the validity of the claim, would have to know many facts as, for example, whether the mortgagor was at the time of the loss also a Canadian and has a good claim on his own behalf, whether the mortgagor is liable on his personal covenant to the mortgagee, and whether he is likely to repay him. Similar problems arise where a mortgagor is a claimant. There seems little reason to compensate a Canadian mortgagor out of the War Claims Fund for the full value of the property lost if his equity in it was of little value and there is little likelihood of his ever paying the mortgagee, who in some cases may even no longer have a right of recovery. It would be unwise to lay down detailed rules for dealing with claims by mortgagees and mortgagors before some evidence is heard. There are several claims on the files by mortgagees and my recommendation is that their status as such be not regarded as sufficient to bar their claims. Nor, of course, should the status of mortgagors be regarded as sufficient to bar their claims no matter how little their apparent equity in the property was at time of loss. As an instance of a method by which claims of mortgagees may be dealt with, see Allied Powers Property Compensation Law, Article 7, paragraph 2.

13. *Claims for losses by insurance companies who have paid policy holders amounts due to them under war risk insurance policies in settlement of claims for the loss of ships, cargoes or other property destroyed by war operations.*

These claims are based upon the alleged right of the insurance companies to be subrogated to the war claims of the assured. These subrogation claims must be disallowed for the reasons given by Mr. Commissioner Friel in his decision in Case 1501, *re the Western Assurance Company,* Reparations, Vol. II, pp. 625 and 626. Mr. Friel said:

> "In the case of the loss of a ship we recommend as compensation to the owner the difference between the value of the vessel and the amount of insurance received. There is no provision for the insurers. Their damage is indirect and consequential. The ship was not their property. For a premium which they increased and regulated according to the risk, they sold the owner insurance. That was their business. They had losses and they had profits. There is nothing in our Commission or in the Orders in Council upon which it is based, or in the spirit or intent of the proposal to make compensation under the categories that would call for subrogation in cases of this kind.
>
> We may well follow the ruling laid down for the Reparation Commission in the Treaty—not to be bound by any particular code or rules of law, but to be guided by justice, equity and good faith.
>
> There is no reason why the insurance business should receive special consideration. I would disallow the claim as it does not come within any of the categories of the First Annex to Section (I) Part VIII of the Treaty of Versailles."

14. *Claims by creditors for losses alleged to be due to the loss of debtors' properties or the death, disappearance or bankruptcy of debtors as a result of the war.*

These claims should be disallowed. The war doubtless interrupted the discharge of many, and may have prevented the discharge of some, pre-war obligations. But the link of causation, where it can be proved, is between the existence of a state of war and the loss rather than between an act of war and

the loss. Even where the cause can be shown to be an act of war and the loss of the amount owing is claimed as damages flowing from that act such damages would ordinarily be too remote. The debt might not have been paid for other reasons. In Case 796, *re Hugh H. Nelson,* Reparations, Vol. II, pp. 172 and 173, the decision of Commissioner Friel was that a creditor's claim for the amount of a debt due from a passenger who lost his life on the *S.S. Lusitania* was not admissible, the claimant's damages being indirect and consequential. Unless the debt has been divested by enemy authorities by a wartime special measure the creditor must look to his debtor alone.

15. *Claims for loss of share certificates.*

Ordinarily these are not the sole evidence of the ownership of an interest in property or enterprise and claims for such losses should be disallowed.

16. *Claims for loss of insurance policies.*

It is not quite clear from the files what transactions resulted in these losses. If the policies were allowed to lapse because of the disappearance of the policies claims for losses sustained as a result of the lapsing should be disallowed as such losses are indirectly caused and the damages alleged are too remote. If possession of the policy is a condition of entitlement the claim may be a good one, as in the case of a bearer bond. If a Canadian assured, on the ground of his enemy character, is compelled to take the cash surrender value of his policy and the cash is appropriated by the enemy authorities he, of course, has a good money claim. It is unnecessary as well as impossible to be more definite about the treatment of claims based on the loss of insurance policies but there should be little difficulty in applying the general principles set out elsewhere in this report to such claims.

17. *War risk insurance premiums.*

These should be disallowed. They are not claims for loss of or damage to property. In many cases they do not represent a true loss. The assured purchased protection which he received. When the expense was incurred in commercial operations it was ordinarily treated as a business expense and recouped in the course of business. (See Case 1457, *re Canada Steamship Lines, Limited,* Reparations, Vol. II, pp. 577-587 and *supra*).

18. *Claims for losses which could have been insured against.*

The Sumner Commission stated in its final report of February 26, 1924, p. 9, with reference to its position respecting the consequences of the claimant not carrying insurance, the following:

> "The Commission have continued to apply the principle, that in the case of persons whose position justified the expectation that, in the ordinary course of things, they would appreciate and resort to insurance, it would be inequitable to allow them to rank, when insurance was available for their protection against the losses actually incurred. In the case of the Government Air Raid Insurance, this involved the consideration of the dates at which experience first showed certain zones to be within striking distance of enemy aircraft, and zones were accordingly carefully fixed in view of the date and the localities of the raids. Persons who could not reasonably be expected to insure were in all cases relieved from the application of this principle."

This principle was not applied by Commissioner Friel who stated in his report of December 14, 1927, Reparations, Vol. I, pp. 18 and 19, the following:

> "Where claimants had already received compensation by way of insurance or under the Workmen's Compensation Act or any scheme of War Risk Compensation or from any public fund, the amounts received

have been taken into consideration. The British Commission held that no moral claim upon the fund which they were distributing could be recognized in favour of persons who had at their disposal means of protecting themselves against loss, to which they should have resorted, or who elected to run a risk themselves rather than make use of such protection. They applied the principle that in the case of persons whose position justified the expectation that they would appreciate and resort to insurance, it would be inequitable to allow them to rank, when insurance was available for their protection against the losses actually incurred. The British fund in this and in other respects is distinguishable. Counsel was asked in one of the shipping claims before this Commission why his clients had not availed themselves of war risk insurance. He answered that they chose to carry their own insurance. The not unreasonable reaction to this policy would be to let them bear their loss. I have, however, assessed property at the merchantable value where there is no insurance, and that value less insurance moneys collected where there was insurance."

It will be noted that Commissioner Friel gave no reason for not following the principle applied by the Sumner Commission. In my opinion, that principle should be applied and the claimants, who for the most part are owners of ships and cargoes, who could have taken out war risk insurance, should not be entitled to claim where their position justified the expectation that in the ordinary course of things they would appreciate and resort to insurance and they did not do so. The claim should be reduced for this reason only by the amount of the insurance which they might reasonably have been expected to be able to obtain plus the estimated amount of the premium which the insurance would have cost. If such claimants were allowed the full value of the property lost, although they neglected to insure, other claimants who had paid out insurance premiums would be discriminated against. The negligent owner would, in effect, be getting free insurance. This would be a real and substantial benefit to him as in most cases I would expect that his charges to customers, purchasers and users of his services would be the same as if he had been carrying insurance.

19. *Claims for losses where claimant has been indemnified in whole or in part by payments under war risk insurance policies.*

No more than the value of the property lost less the insurance moneys should be allowed the claimant in any event, and there may be cases where the application of the principle in 18 would make it inappropriate to allow the full difference between the value of the property lost and the insurance moneys collected.

20. *Claims for losses not resulting from war operations, but from some cause which the owner could have insured against had he not fled or been interned or detained.*

These claims should be disallowed as not resulting from war operations and because the damages are too remote, there being no way of determining whether the owner would have insured in any event.

21. *Claims for expenses incurred by ship owners upon the sinking of a ship in returning the members of the crew and passengers to port.*

These claims would, ordinarily at least, be good, being financial losses directly resulting from war operations.

22. *Claims for losses from forced sales.*

The files do not clearly indicate the nature of the transactions referred to as forced sales. But if enemy authorities compelled a Canadian on the ground of his enemy character to sell physical assets and appropriated the

proceeds the Canadian would have a good physical assets claim. It seems to me also that if the enemy authorities forced a Canadian on the ground of his enemy character to sell his property to an enemy national for an inadequate consideration the transaction morally is in the same position as if by a wartime special measure the Canadian had been deprived of part of the value of his property and he would have a good war claim.

23. *Claims for loss of property such as family photographs which cannot be replaced and which have only a sentimental and no pecuniary value.*

As the loss or damage must in all cases be measurable in pecuniary terms, such claims should be disallowed. Where, however, the loss is susceptible of pecuniary measurement, as is conceivable in the case of the loss of some manuscripts, there is a good claim.

24. *Claims for losses as a result of the laws, regulations, executive orders or controls of Canadian or Allied Governments or authorities.*

These ordinarily were suffered by fairly large classes of populations, were not special to the claimants and should not be allowed. Moreover, the causes of these losses cannot be regarded as war operations although they were measures necessitated by the existence of a state of war. It may be necessary in some cases to draw a fine line between acts of the military authorities which were and were not acts of actual warfare. But certainly no acts of the Canadian or Allied civil authorities should form the ground of a war claim. Otherwise wartime regulations and orders of many kinds and affecting in some cases the whole population of Canada would be drawn into the category of war operations. Moreover, where compensation has been limited by law or regulations having legal effect as under the Compensation (Defence) Act, 1940, there should be no further claim for compensation against the War Claims Fund as the amount which Parliament or agencies authorized by Parliament have fixed as adequate has been paid.

25. *Claims for losses of or damage to property outside of Canada resulting from orders given in a theatre of actual warfare by the Canadian or Allied military, naval or air force authorities for the purpose of denying or diminishing the use of such property to the enemy.*

These claims should be allowed as coming within the class of physical loss of or damage to tangible things caused by actual warfare by belligerent armed forces.

26. *Claims for the expenses of going into hiding to avoid internment, of shipping moveables out of the country to prevent them from possible seizure, loss or damage, of transporting, storing and insuring moveables left in the country upon flight either after invasion by the enemy or in anticipation of invasion, of fleeing from an enemy country or from another country in anticipation of invasion, or of returning to Canada before, during or after the war or after liberation from internment.*

These claims present peculiar difficulties but I think should be disallowed. The position of Canadians in foreign countries which either became enemy or enemy-occupied upon or after the outbreak of war is normally that legitimately they may be interned and their property sequestrated. At the end of the war they should be released and their property returned to them or paid for by the enemy. If their property is not seized and is lost or damaged by war operations the loss or damage should be made good by the enemy. Any steps they take to avoid internment or seizure or destruction of their property should be regarded as taken on their own financial responsibility. As in the normal case they would be returning to Canada eventually

the costs of their return should be borne by themselves. Some Canadians were repatriated after the war or after release from internment, the Government advancing the expenses of return by way of loans. Other Canadians abroad may not have applied for repatriation because of the obligation to repay, and if such expenses are now defrayed out of the War Claims Fund the latter would be discriminated against.

27. *Claims for the cost of food purchased abroad during the war.*

These claims also present difficulties. The Canadian Government through a Protecting Power disbursed a large amount in relatively small sums as relief to Canadians abroad during the war, some of whom were in internment, some not. These sums were advanced subject to repayment and the greater part of the amount advanced has been repaid. In some cases Canadians abroad paid for food out of their own funds. The extent of the obligations of enemy powers to supply food cannot be defined with any certainty. In at least one case after World War I the Commissioner declined to recommend reimbursement of an interned Canadian for money spent for food, on the ground that had he not been interned such expenditure on his own account would have been necessary. (See Case 1380, *re George N. Purdy (now deceased)* Reparations, Vol. II, pp. 513-516). To the extent that deprivation of food is regarded as maltreatment for the purpose of recommending maltreatment awards as above, expenditures for food may be regarded as defrayed, in part at least, by these awards. Some Canadians may not have applied for relief because of the obligation to repay and if such expenditures were now defrayed out of the War Claims Fund these Canadians would be discriminated against. On the whole I think the claims should be disallowed.

28. *Claims for amounts which were entered on books of camps as payable for labour performed at instance of interning or detaining authorities but not paid.*

These may be referred to as claims for uncompensated labour. There are no such claims on the files but as some labour of prisoners of war, and perhaps others, was not compensated, the subject should be dealt with. If such claims were dealt with as money claims it would probably be impossible to give a value in Canadian currency to the currency in terms of which the obligation to pay was assumed. Military pay and allowances were paid by the Canadian Government for the whole period of internment. I should think the difficulty of proof would in most cases be insuperable. If discrimination were to be avoided the allowance of such claims would entail the recognition of claims for pay for work of every kind in and about internment camps and the task of fair adjudication would become impossible to perform. To the extent that forcing labour without compensation is regarded as maltreatment for the purpose of recommending maltreatment awards, the unpaid compensation may be regarded as covered in part at least by these awards. For these reasons, I feel compelled to recommend disallowance of such claims.

29. *Claims for the return of money extorted by captors.*

The files indicate that in one case the Japanese compelled a Canadian detained by them to pay them $250 U.S. per month for a number of months. This transaction does not appear to have differed morally from theft and should be regarded as founding a good claim.

30. *Claims for expenses of establishing claims.*

I can find no record of any such expenses being allowed after World War I and if any expenses of establishing claims against the War Claims Fund are to be allowed, strict limitations must obviously be imposed, otherwise the Fund may be subjected to a very heavy drain to members of the legal profession

and to architects, engineers, valuators, and other experts. I think that no expenses of establishing claims should be allowed except such reasonable expenses necessarily incurred for services performed abroad for the purpose of enabling claimants to establish their claims as are approved by the Commissioner. Provision for allowance of reasonable expenses incurred in Italy, Hungary, or Roumania, as the case may be, were provided for in the treaties with these countries and for those incurred in Japan in the Allied Powers Property Compensation Law. The expenses approved by the Commissioner should be limited to a small percentage, say 10 per cent of the amount paid to the claimant out of the War Claims Fund, and it should be understood that this percentage is not to be allowed automatically, either in whole or in part.

31. *Claims by partnerships.*

As partnerships are not persons but consist of persons, partnerships should not be allowed to claim. A Canadian having an interest in a partnership should claim on the basis of his interest. There may be charitable associations of a clearly Canadian character as to which special rules will have to be made upon application to the adjudicating tribunal and after report thereupon to the Government, but I know of no claims by such.

32. *Claims by shareholders in corporations.*

It is recommended that Canadians who held at the time of loss, directly or indirectly, ownership interests in corporations or associations which were not Canadians and whose property was lost or damaged by war operations, should be eligible to claim compensation for damage to such ownership interests. For example, corporation A, not a Canadian, owns property in Germany which is destroyed by war operations. Half the shares of corporation A are owned by corporation B which, although incorporated under Canadian law, is not a Canadian as defined above. X, Y and Z, three individual Canadians, own shares in corporation B. They therefore hold, indirectly, ownership interests in corporation A and should be compensated for their respective shares of half the loss. Had corporation B been a Canadian it would have been compensable for half the loss and X, Y and Z would have had no claims as corporation B would be deemed to receive the compensation on behalf of its shareholders.

Property of Canadians as defined above would include ownership interests, held by Canadians, directly or indirectly, in corporations or associations which are not Canadians. Notwithstanding the rule that no compensation should be payable unless it is for damage resulting directly from war operations, compensation should be paid to Canadians, whether individual or corporate, for the damage to their shares in the capital stock of companies which are not Canadians where that damage to the shares resulted from damage to the property of those companies directly caused by war operations. How should such damage to the shares be computed? A question of this kind was given consideration by the United States-German Mixed Claims Commission, as indicated by the following passage from Kiesselbach's Problems of the German-American Claims Commission, pp. 117 and 118:

> "The question, how this loss suffered by an individual by reason of participation in a corporation shall be computed and proved, has apparently been settled neither by judicial decision nor by general principles . . . So it is quite conceivable that the damage suffered by a shareholder by reason of losses suffered by the corporation need not be identical with a fraction of the loss suffered by the company, this fraction corresponding to the ratio of his share to the total capital of the company; that, for instance, the extent of the obligations existing for the company may bring it about that the indemnity owing to the company is absorbed in whole or in

part by payments to creditors of the company, so that the loss imposed upon the company really does not affect the partners but the creditors of the company. It is also conceivable that despite the loss suffered by the company, the commercial or market value of the individual share is not diminished. Hence it is by no means clear how the individual shareholder will be able to compute his share of loss."

It does not appear that the United States-German Mixed Claims Commission laid down any rule for computation of the loss. In my opinion, the only workable rule, a rule which will prove to be substantially just in practically all cases, is that laid down in the treaty with Italy and in the Allied Powers Property Compensation Law of Japan.

Article 78, paragraph 4 (*b*), of the former as follows:

"United Nations nationals who hold, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals within the meaning of paragraph 9 (*a*) of this Article, but which have suffered a loss by reason of injury or damage to property in Italy, shall receive compensation in accordance with sub-paragraph (*a*) above. *This compensation shall be calculated on the basis of the total loss or damage suffered by the corporation or association and shall bear the same proportion to such loss or damage as the beneficial interests of such nationals in the corporation or association bear to the total capital thereof.*"

Article 11, paragraph 1, of the latter is as follows:

"The amount of damage relating to shares of stock other than those of which the issuing company is an Allied national mentioned in the provision of Article 2, paragraph 2, item (2) or (3) shall be a sum of money, *which is the amount of damage to the issuing company calculated in accordance with the provisions of Article 12, multiplied by the ratio of the amount of the paid up shares of the stock which were owned by the Allied national at the time of the commencement of the war to the amount of its paid up capital at the time of the commencement of the war.*"

In determining the damage to ownership interests held directly or indirectly by Canadians at time of loss in corporations or associations which were not Canadians at time of loss the principles of the italicized passages should be applied.

33. Claims by the Government of Canada.

While I am prepared to recommend that the Government of Canada should forego any claim on the War Claims Fund for any part of the general costs of the war, there are certain Government of Canada claims which, in my view, should rank as property claims. These claims are claims by Federal Government departments in respect of property of a non-military nature, such as office furniture and fittings of the Departments of Trade and Commerce, External Affairs, Citizenship and Immigration, National Revenue, National Health and Welfare and the Public Archives lost or damaged during the war, or banking accounts of Government departments seized during the war and not returned after the war. The Government of Canada should be subject to the same priorities as other property claimants, and be treated as one claimant, except where it claims reimbursement of amounts which it has paid out of sources other than the Fund to persons who could have claimed such amounts from the Fund. Where the Government of Canada has already paid a person out of sources other than the War Claims Fund any amount for which that person could have ranked against the Fund either for property losses or for losses from death or personal injuries the Government should be entitled to claim this amount against the War Claims Fund and have the same priorities in each case that the person paid would have had if he had not been paid and

had claimed against the Fund. Provincial or other governments which are Canadian should, of course, also be permitted to claim in the same manner as the Federal Government.

34. *Claims for business losses arising because the outbreak of war prevented goods from being shipped to certain markets, buyers or consignees.*

In most cases claimants claim the difference between what they eventually received for the goods and what they allege they would have received but for the outbreak of war. Such losses should be regarded as due to the existence of a state of war rather than to war operations. In addition, the claims are somewhat speculative and barely, if at all, distinguishable from claims for losses of prospective profits. The claims should not be allowed. Case 1441, p. 564, *re Fred H. Cowan;* and Case 1444, p. 565, *re Estate of John T. Smith,* in Reparations, Vol. II, are in point as precedents.

35. *Miscellaneous claims of one kind and another.*

It is impossible to make detailed recommendations with regard to these and if such recommendations were attempted they would obviously not cover the entire field as one cannot foresee the types of claims that may later be presented. The only recommendation that can be made is, therefore, that the principles set out in this report be applied as nearly as possible.

Valuation of Claims for Property Losses

In the preceding discussion of claims for property losses two distinct types were mentioned, namely "money claims" and "physical assets claims". Of these types the latter, consisting of claims relating to real property or chattels which were lost by destruction or otherwise or damaged by war operations as defined above, constitute all but a relatively small number of the property claims.

Money Claims

Money claims are claims for compensation for loss of cash, bank balances, bonds, other contract debts, and other claims arising from the loss of rights to be paid in money. For example, in some countries bank accounts and other debts due to Canadians were seized or collected by enemy authorities discharging duties comparable to those of our Custodian of Enemy Property. At the end of the war it was found that none or only part of the amounts collected were in the hands of the enemy authorities, and claims have been presented, legitimately enough, for compensation for the loss of the amounts not available. In other cases bank balances belonging to Canadians have been appropriated or liquidated by enemy authorities and, it would appear, in circumstances which leave the banks not liable to the Canadian depositors.

The money which, or the right to which, has been lost is in all or practically all cases the currency of a foreign country, usually a country which was enemy or enemy-occupied. How should these claims be valued in terms of Canadian currency? To answer this question certain assumptions must be made, I think justifiably, as to what would have happened had the loss not arisen. In that case the money or the right to the money would have been available to the Canadian owner of it at the end of the war. While it cannot be definitely said that in all cases and in all countries the Canadian owner of the money or the right to money could not have disposed of it or dealt with it until after the war, I think I am justified in assuming that this normally would have been the case as the Canadian owner would be an enemy of the constituted or occupying authorities and in some countries at least his

bonds, bank accounts, etc., would be subject to sequestration. Money claims, therefore, are based on losses which did not really arise until after the termination of hostilities, and the claimant's true loss was a loss after the termination of hostilities of a sum of money expressed (in the usual case) in what was the local currency of the country at that time. The claimant, it seems to me, should as far as possible be put in the same position as if at the end of the war he had then had the money or right to money of which he had been deprived. If so, the Commissioner's duty should be to determine that amount or the value of that right in local currency and express that amount or value in terms of Canadian currency by the application of an appropriate exchange rate.

The period after the war was in most countries one of economic and financial disruption and the determination of appropriate exchange rates presents problems of great difficulty. The official rate of exchange is not necessarily a reliable guide, since such rates have generally been applied only to certain categories of transactions, mainly concerned with the international movement of goods, which are cleared through the official exchange market. For other types of transactions, including in particular those representing the withdrawal of non-resident capital, the benefit of the official rate was not available. Such transactions were generally effected, if at all, at unofficial or black market rates which placed a lower valuation on the local currency than did the official rate. However, there was as a rule no organized or continuous exchange market for transactions of this type in which rates were publicly quoted; each transaction tended to be a negotiated deal. It has in consequence seemed to me impractical to place on the Commissioner the onus of determining what the effective rates of exchange would have been for transactions of the type here under consideration. However, it is the case that after the devaluation of sterling the "effective" rates of exchange for capital withdrawals from the sterling area and the countries of Western Europe and the currency areas associated with them were brought much closer into line with the official rates than had previously been the case, and I think that ordinarily the official rates after that date might reasonably be applied for converting money claims in these foreign currencies into money claims in Canadian dollars. I recommend, therefore, that in this conversion of money claims where the claims arose from loss of the currencies or rights to currencies the rates of December 30, 1949, as set out in Schedule A, be applied. In this Schedule the rates shown are the official rates for the countries of the sterling area and Western Europe and associated currency areas and are believed to be the "effective" rates for other countries where there was a marked discrepancy between the official and the "effective" rates.

One type of money claim is that of claims for compensation for losses of bearer bonds. As stated above, if a bearer bond is lost the owner is divested of his right. If the bond has been redeemed the owner would, of course, have a valid money claim for the amount paid to redeem it. If it was not subject to redemption or has not been redeemed it is recommended that compensation be on the basis of the average of the market values of the bond at the end of each calendar year from 1945 to 1949, such value to be converted into Canadian dollars in accordance with Schedule A. In cases where the currency of a country has been subject to a so-called currency reform the appropriate replacement factor used in the Schedule with respect to those currencies should be applied in calculating the average market value.

Physical Assets Claims

The question which arises at the outset is whether the cost of restoration, reinstatement, reproduction or replacement of the lost or damaged physical assets at some period after the war should not be adopted as the basis for compensation. This basis is commonly referred to as the replacement basis and is to be used under the treaties with Italy and Japan. This at first might appear to be a fair basis but I have concluded that there are so many objections to it that it should not be adopted. Some of these objections are as follows:

1. The probabilities are that in many countries it would be impossible to arrive with any approximation to accuracy at replacement costs. It is at least uncertain in many cases whether, and when, materials for replacement would have been available in some or all of these countries. Then too, plants destroyed in countries which are now "Iron Curtain" countries might not legally be replaceable by private owners. The dates of Communist ascendancy to power in the following countries were: Roumania, March, 1945; Yugoslavia, January, 1946; Bulgaria, July-November, 1946; Poland, February, 1947; Hungary, June, 1947; and Czechoslovakia, February, 1948. The mainland of China, parts of Indo-China, Eastern Germany, and the former Baltic States of Esthonia, Latvia and Lithuania are under Communist control. In these countries, at least, and probably in others, the cost of replacement, if ascertainable at all in local currencies, often fluctuating in purchasing value, would almost certainly be unascertainable with any approach to accuracy in Canadian currency. The extent of the difficulties will be realized if one considers the task of a Commissioner charged with the duty of ascertaining replacement costs in Canadian currency in any of the countries above named. In addition to the difficulties I have mentioned there is nothing to indicate the possibility of securing satisfactory evidence as to such costs in such countries.

2. For some types of property replacement is obviously an unfair and inappropriate basis. For example, a claimant for compensation for damage to a luxury villa in central Europe might be able to establish a very high replacement cost yet his actual loss on the basis of the reasonable market value of the villa might be very small. The unfairness of compensating such a claimant on the basis of replacement becomes apparent if one considers the case of a claimant whose intention and desire is to remain a resident of Canada and to convert his European assets into Canadian currency as soon and rapidly as possible. Then too, the replacement costs of churches and other religious institutions in China might give claimants an obviously excessive award in view of what is understood to be the status of religious institutions in China at the present time.

3. Replacement cost as a basis for compensation would completely depart from the precedents established after the last war in Canada. At that time value at time of loss plus interest was taken as the basis and not replacement.

4. The replacement basis is not used except in most exceptional circumstances in valuing property losses in actions in the courts of this country. Nor is it in the English courts. (See *Moss* v. *Christchurch Rural District Council* [1925] 2 K.B. 750).

5. While replacement cost was taken as the basis of compensation under the treaties with Japan and Italy this precedent has little bearing on our present problem because the compensation provided for by these treaties is in local currencies, it is paid by the governments of ex-enemy countries without restriction to a limited fund, and in the case of Italy it is subjected to a 33⅓ per cent discount.

For these reasons I would reject replacement costs as a basis for valuations. Evidence of them may, however, conceivably be of some assistance to the Commissioner in arriving at valuations on the basis recommended below. Evidence of replacement costs has been admitted in the courts to assist them in determining the value at time of loss or the difference between the money value before the damage and the money value after the damage to the property.

Principle Applied After World War I to Physical Assets Claims

The basis of valuation used after World War I in assessing claims under the Treaty of Versailles and the Treaty of Berlin is well set out in the following citations:

> "The Commission holds that in all claims based on property taken and not returned to the private owner the measure of damages which will ordinarily be applied is the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place." (Administrative Decision No. III of United States-German Mixed Claims Commission (p. 63) as quoted in Whiteman, Vol. II, p. 1285).
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> "These rules have been consistently followed by the Commission. . . . Under them the amount of Germany's liability for the material or physical damage of tangible property of every nature has been determined. In computing the reasonable market value of plants and other properties at the time of their destruction, the nature and value of the business done, their earning capacity based on previous operations, urgency of demand and readiness to produce to meet such demand which may conceivably force the then market value above reproduction costs, even the goodwill of the business, and many other factors, have been taken into account. But this is quite a different thing from assessing damage for loss of prospective earnings or profits for a period of years computed arbitrarily or according to the earnings of competitors whose properties were not destroyed, and the awards made by this Commission do not embrace the items claimed of prospective earnings or prospective profits." (Administrative Decision No. VII as quoted by Whiteman, Vol. II, p. 1285).
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> "The measure of damages applied is the reasonable market value of the property as of the time and place of loss or destruction, if it had such market value; if not, then the intrinsic value of the property. . ." (Report of Commissioner Friel dated December 14, 1927, Reparations, Vol. I, p. 19).

As will be seen, my recommendation will be that these principles be applied to the assessment of physical assets claims. Resort should never be had to any value other than the reasonable market value as the basis of compensation if the assets lost or damaged had a market value. If they did not have a market value, intrinsic value may be used. But as the term "intrinsic value" lacks precision, my recommendation is that in every case where a Deputy Commissioner is of opinion that there is no market value he should state in the decision which he submits to the Chief Commissioner that he has assessed the compensation on the basis of intrinsic value and not on the basis of reasonable market value. As will be seen, it will be part of the duties of the Chief Commissioner to make sure, as far as possible, that the same principles of valuation are applied to cases similar to one another and it will be desirable that he be expressly informed of every valuation made on the basis of intrinsic value so as to reduce to the minimum the possibility of such valuations getting out of line with one another.

It will now be convenient to consider by categories the basis of compensation that should be used.

Losses on the High Seas

Some of the claims are in respect of losses of physical assets on the high seas, such as ships, cargoes, and personal effects and other moveables. With regard to these losses there is, in my opinion, no reason why the precedents established by the Commissioners in Canada after World War I should not be followed. The measure of compensation should be the reasonable market value of the property as of the time and place of loss in the condition in which it then was with interest from time of loss to time of settlement. The property lost on the high seas was in practically all, if not all, cases marketable property and there should be no necessity in any case for the use of intrinsic value, though the possibility of such necessity cannot be entirely dismissed. As the owner of property who lost it at sea could have continued to use it and deal with it and obtain financial benefit from it from the time of loss, had it not been lost, he should receive interest on the reasonable market value from the time of loss. As indicated elsewhere in this report, insurance moneys must be deducted. If the claimant is the owner of a chartered ship and the terms of the charter-party were such that they would have had the effect of reducing the price which the owner could have obtained for it if sold burdened with the charter, the measure of the owner's compensation should be the price for which the ship could have been sold on the market at the time of loss burdened with the charter. If, as to the same ship, the charterer also claims, his compensation (if he has a *jus in re*) should be an amount equal to the difference, if any, between the award to the owner and the reasonable market value of a free ship not burdened with the charter. If the owner of a chartered ship claims in a case where the stipulated hire was more than the current market hire so that the charter was an asset to him tending to increase the price which could have been obtained for the ship by selling it on the market at the time of loss, the owner then really owning more than a free ship, what should be the measure of his compensation? No such case is disclosed by the files but if there should be one, I think the owner's compensation should be limited, as it was after World War I, to the reasonable market value of the tangible thing, namely, the free ship. Fairly considered, this was the extent of the loss inflicted. Any further sum would be in the nature of compensation to the owner for loss of an advantageous bargain with the charterer, which should in my opinion not be compensable. Other questions of comparable difficulty may arise in assessing losses of ships and reference is made to those parts of Administrative Decision No. VII of the United States-German Mixed Claims Commission quoted in Whiteman, Vol. II, pp. 1286-1288, which will furnish helpful guidance to the adjudicating tribunal.

Losses on Land

With regard to losses on land the general principle, subject to the modifications set out below, should be as follows:

1. Where the loss is total the measure of compensation should be the value of the property at the time of loss.

2. Where the loss is partial the measure of compensation should be the difference between the value of the property immediately before and immediately after the injury.

This is the normal measure of damages in actions for injury to land in the civil courts. The measure of damages is the diminution in the value of the land or of the plaintiff's interest in it and not the sum which it would take to restore it to its original state. (See Mayne on Damages, 11 Ed., p. 462). It is the difference between the money value of the claimant's interest in the property before the injury and the money value of his interest after the injury.

I realize that there have been variations in the application of this principle even in the civil courts and even as applied to damage to real property, and in particular that while the measure for damages for the wrongful taking or destruction of a chattel is ordinarily the value of the chattel at the time of the act (Mayne, p. 416; Halsbury, Vol. 10, pp. 136-138) the measure for damages for partial loss of a chattel or damage to it as distinguished from destruction of it is often the cost of repairing it, the difference in value between the former worth and that of the chattel when repaired, and the damage sustained owing to loss of use of the chattel while being repaired (Mayne, p. 440; Halsbury, Vol. 23, p. 726). But I do not recommend that these variations from the principle first laid down should be made in assessing war claims. The compensation allowed should be the value at time of loss in the case of complete destruction or loss and where this is incomplete the difference in the values before and after the act which caused the damage. In practice it may be found that in cases of partial loss the most convenient way of arriving at the difference in value before and after the injury would be to estimate the damage as a percentage of the total value of the property and fix the compensation accordingly. For example, if an act of war damages built-upon real property so that half of its value has gone, half the value before the damage is equivalent to the difference in values before and after the damage was done. As will be seen below it will, I think, be necessary to take a fictional or notional date as the date of losses on land of physical assets for reasons which will be explained but the principles applicable to the determination of the compensation should, though related to that date, be those which I have outlined.

The word "value" often presents great difficulties. Whiteman, Vol. II, pp. 1548 and 1549, says:

> "Rules stating that the fair value, the inherent value, the actual value, the actual cash value, the actual value to the owner, or the real value are to be allowed, are frequently enunciated in connection with broad generalizations on the subject of damages. If these phrases mean that value is inherent in the thing itself, they are in the main misleading, for value is relative. It is futile to attempt to demonstrate the "real meaning" of such terms. They are variously used with varying shades of meaning, depending upon the person using them. The language adopted often purports to lay down rules for the measurement of damages when what is expressed is only an ideal or aim to be approximated.
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> Finally, it may be said that whether only one of these terms is used, or a combination of them, in describing the amount arrived at or the method of determining that amount, it will be evident from the context of the decisions in the various cases that the amount allowed in any case should be that to which the claimant is reasonably entitled under all the circumstances."

The rule laid down in the last paragraph cited is not particularly helpful. I think greater definiteness is possible. While "value to the owner" may be the measure of compensation in expropriation cases and in some civil actions of tort, I find it hard to apply to war claims. An owner's circumstances where he is an alien property owner—alien to the country in which the property is situate, or to the power occupying that country—are peculiar and I am afraid that to conduct inquiries into such questions as what a prudent Canadian in the position of the claimant would have been willing to give for property in an enemy country sooner than fail to obtain it would produce strange results if applied to all claims for losses on land. Among property losers were doubtless those who desired intensely to liquidate their properties and remove the proceeds to Canada. There were doubtless others who were eager to retain their

investments abroad. For Commissioners to inquire into desires and intentions would, if not futile, yield many unreliable results. On the other hand to ascertain the reasonable market value of property, provided it is related to a suitable date, would in most cases, I believe, be feasible. In my opinion the rule should be that in all cases where there were market values the values sought for should be the reasonable market values—that value should be taken as meaning reasonable market value. There may be some forms of property as to which some departure from this concept of value may be necessary. For example, a church or religious institution may, as such, have no market value. It is suggested that in the case of a church, if there is no ascertainable market value, the adjudicating tribunal in determining the intrinsic value might take into account subsequent events and value such institutions with these in mind. If, for example, conditions in a country became such that churches a few years after the damage was inflicted had no value, or practically no value, to church authorities, because the civil authorities have decided not to let them function in the country, the value for use for a limited period might be the proper method of valuation. The kinds of property for loss of or damage to which claims have been or may be filed are so numerous that it is impossible in a report of this kind to make recommendations covering every situation that may arise. But if reasonable market value is taken as the basis of valuation to be adhered to just as strictly and rigidly as possible, and all decisions of Deputy Commissioners are reviewed by the Chief Commissioner as recommended below, a reasonable degree of consistency between awards can, I think, be achieved.

The question now arises as to whether value at the actual rather than at what may be called a notional time of loss should be adopted for losses on land as well as at sea. Most, if not all, of these losses on land took place in countries which were either enemy or enemy-occupied. Two difficulties arise in taking reasonable market value at actual time of loss in such cases. The first is that the financial and economic instability and disruption in these countries during the period when the loss took place would make the ascertainment of a "reasonable" market value generally impracticable. The second difficulty is that even if such reasonable market value could be ascertained such value could not be converted into Canadian money because there would not be at that time any ascertainable fair rate of exchange between the local currency and Canadian currency. It is therefore necessary to assume for valuation purposes that the loss took place either before or after the war, and to make valuations on a pre-war or a post-war basis. The words "pre-war" as far as hostilities in the Far East are concerned should be taken as meaning June 30, 1941, and as far as hostilities elsewhere are concerned as meaning June 30, 1939. While some European countries did not enter the war until after September, 1939, there was a general unsettlement of financial and economic conditions in all such countries following the outbreak of war in September, 1939. Moreover, as valuations can only be approximate in any event, the difference between attempting to arrive at valuations as of prior to September, 1939, and as of varying dates in 1940 and 1941, is not great. The selection of a specific date for the Far East and a specific date for other areas in the world has the advantage of definiteness and narrowing the range of investigation of market values.

After much consideration I have come to the conclusion that the pre-war basis of valuation should be used. The meaning of "pre-war basis" should be more closely defined. As to physical assets losses in the Far East it means that the property lost or damaged be given the reasonable market value which property identical as to location, age, state of repair and condition and otherwise at the actual time of loss would have had on June 30, 1941; and that as to losses elsewhere it be given the reasonable market value which property identical as to location, age, state of repair and condition and otherwise at the actual

time of loss would have had on June 30, 1939. Where the property was owned by the claimant prior to the war its pre-war reasonable market value less depreciation to actual time of loss could often be taken. The valuation so obtained could then be converted into Canadian currency at the pre-war rates of exchange. These rates are set forth in Schedule B for those countries to which the date of June 30, 1939, is applicable, and in Schedule C for those to which June 30, 1941, is applicable.

In the case of losses which can receive a pre-war valuation directly in Canadian dollars the application of an exchange rate will not be necessary. Examples of such losses would be the many chattels purchased in Canada or the United States before the war and having a definitely ascertainable value in Canadian money on the dates mentioned.

I will now give the reasons why the pre-war basis of valuation should be used.

At the outset it should be said that if it were possible to value the losses as if they took place shortly after the termination of hostilities it would be desirable to do so. For many, if not most, Canadians who suffered property losses during the war these losses did not become real losses to them until after the conclusion of hostilities. While it cannot be said with certainty that in all cases claimants could not have used or dealt with the lost or damaged property during the war had it not been lost, it certainly cannot be said that generally, at least, Canadians whose property in enemy or enemy-occupied countries was lost during the war would have been free to use or deal with it had it not been lost. Such property would have been enemy property in the country of loss and in various countries there were special measures, such as the Trading with the Enemy Acts in the United Kingdom and Canada, under which property of enemy nationals could be sequestrated. In some countries it was not the practice—indeed it was not the practice under our Trading with the Enemy Act—for custodial authorities to account to the owners for interest earned on assets while in custody (although in Canada there was an accounting for revenue earned on assets prior to liquidation). On the whole, and having in mind the undesirability of involving Commissioners in lengthy hearings as to varying practices in various countries, I think the principles governing compensation should, as far as possible, be based on the assumption that no financial benefit would have accrued to the Canadian loser of property, if it had not been lost, until the end of a reasonable period after the end of hostilities. This, of course, is a reason for not compensating for loss of use of property, whether lost or damaged or not, and it is a reason for not allowing interest on awards except from a reasonable time after the termination of hostilities which I would fix as January 1, 1946, both for physical assets claims and for money claims for losses on land abroad. It was then that the real loss occurred.

But I am afraid that if an attempt were made to determine reasonable market values in most countries as of January 1, 1946, or as of any date after the war to be applicable in all countries of loss, the result would be so inequitable as to be worthless for practical purposes. Account must be taken of such factors as fluctuations in the purchasing power of currency, monetary reforms, nationalization, unstable political conditions, shortages of materials and so forth. Moreover, the ascertainment of suitable exchange rates would be so difficult as to be practically impossible. A very late date might be taken but this would prove unsuitable for countries where widespread nationalization had taken place and there might be no market value for the property destroyed during the war. I feel driven, therefore, to the recommendation that the pre-war basis of valuation be adopted. This will be disadvantageous to claimants in one respect. It will not permit any wartime inflation of values to be reflected in the valuations as they will be in the case of losses on the high seas. But the pre-war basis

has an important advantage to many claimants. It gives them an assumed market value as a basis for their claims whether the property lost would have had any value to them after the war or not. When it is remembered also that payment of compensation is to be in Canadian money, thus enabling claimants to withdraw their capital from many countries from which they could not have withdrawn it during the post-war period, at least except without heavy loss, the pre-war basis appears to be at least sufficiently favourable to claimants. While it cannot be said that all claimants would, had their losses not taken place, have desired to withdraw their assets or their cash equivalent from the country of loss to Canada, this would obviously have been true of many and, I think, of most of them. To such the privilege of securing compensation in Canadian money for foreign losses is a valuable one and places them in a better position than Canadians having the same desire whose property has not been lost or damaged. It may be thought that awards on a pre-war basis should be subject to the application of a coefficient as in the case of Belgium and France after World War I and as in the case of Belgium after World War II. I recommend against the application of any coefficient for the reasons given in 2 (vii) below.

Apart from advantages and disadvantages to claimants of adoption of the pre-war basis, this basis has several points in its favour from the standpoint of precedent, administrability and equity. These are as follows:

1. Market conditions affecting the purchase and sale of property may be presumed to have been much more stable on June 30, 1939, or June 30, 1941, as the case may be, than after the war, and the ascertainment of reasonable market values as of these dates would, therefore, be more feasible.

2. While the precedents are not all in favour of taking the pre-war basis there are many precedents for doing so among which are the following:

(i) United Kingdom Extended Far Eastern Private Chattels Scheme (War Damage), introduced in June, 1949. Provides limited compensation for United Kingdom British subjects who sustained losses in certain territories in the Far East and who have returned to reside permanently in the United Kingdom. Claimants were required to value property lost as at June 30, 1941.

(ii) Scheme of the Malayan War Damage Claims Commission, introduced in 1946. Provides for compensation for damage to or losses of property in Malaya between December 8, 1941, and March 31, 1946, and for compensation for property requisitioned prior to the Japanese occupation. Claimants were required to base their claims as accurately as possible on prices current on June 30, 1941.

(iii) Scheme of the War Damage Claims Commission for North Borneo, Sarawak and Brunei, established in 1947. Provides compensation for war damage to and losses of land, buildings and goods, between December 8, 1941, and March 31, 1946. Claimants were invited to formulate their claims by reference to prices current as of June 30, 1941.

(iv) Scheme of Compensation for War Damage in Belgium, introduced in 1947. Claimants were required to state values as at August 31, 1939. A coefficient was, however, provided for.

(v) Scheme of Compensation for War Damage of the Netherlands, introduced in November, 1945. Provides compensation for war damage to real estate, moveable properties, and household furniture in the Netherlands. Compensation is determined on the values existing on May 9, 1940, except compensation for damage to supplies for trade and industry which is calculated on the cost price.

(vi) Scheme of the United Kingdom Foreign Compensation Commission. This Commission was constituted in 1950 to administer the funds to be received from Yugoslavia and other countries for compensation to persons who had lost properties through nationalization. Claimants for losses in Yugoslavia were required to supply particulars as at January 1, 1939, the Commission stating that that date had been chosen as the latest on which conditions in Yugoslavia are understood to have been normal.

(vii) The method of calculation of war damages both in France and Belgium after World War I was to assess the value of the damage as at August 1, 1914, and then in cases where reinstatement was encouraged for public reasons to grant sums designed to cover the subsequent rise in prices.

These sums were calculated by applying various coefficients to the 1914 value assessed. In my opinion, the application of coefficients would be inappropriate here, not only because of the complete impossibility of arriving at fair ones for the various countries and for the various types of property in these countries, but because of the very substantial advantages which will accrue to most claimants from receiving their compensation in Canadian money computed by the application of relatively high pre-war exchange rates and in receiving compensation even though there may not have been a post-war market for the property lost.

3. Many claims have already been presented on the pre-war basis as it was the only practical basis on which those claims could be calculated.

I may add that I have considered whether the basis should not be pre-war valuation of the loss in local currency converted to Canadian dollars at the exchange rates of December 30, 1949. At first glance this would seem to equate the treatment of property loss claimants to that of money loss claimants. However, it would be much less favourable than the treatment of shipping loss claimants, who, I think, in the interests of stability of compensation practice should be treated as after World War I. Moreover, since I consider that the real loss occurred in the post-war period, post-war valuation, if practicable, would be called for if post-war exchange rates were used. Post-war valuation is not generally practicable. So I am driven to recommending the basis which provides the closest approach to what is desirable and which is most equitable as between all claimants for loss of or damage to physical assets, namely, pre-war valuation and pre-war exchange rates.

Effect of Recommended Valuations of Physical Assets Claims and Money Claims

Because of the great differences in purchasing power of local currencies in various countries between 1939 and 1949 which must be combined with differences in the exchange rates between the local currency and Canadian dollars, it is most unlikely that my recommendations would have exactly the same effect in respect of similar losses in any two countries. Despite this I feel that an illustration of their effect should be given and I have chosen Italy as a typical case which could be applied with variations to other countries or even to Italy with a different type of property. Suppose that in 1939 four Canadians had assets in Italy. A and B each had physical assets worth 100,000 lire, and C and D each had 100,000 lire in cash or money assets. Assuming that these assets could have been converted into Canadian dollars in that year each would have obtained $5,278. (See Schedule B).

During the war A's property was completely destroyed in an air-raid and C's cash was lost in a way that would make him eligible for compensation. After the war B's property was returned to him undamaged and D was able to gain control of his cash again. A and C have war claims, B still has his property which is worth 4,750,000 lire or $8,375 as of December 30, 1949, (see Banco di Roma's Review of the Economic Conditions in Italy for September, 1950, p. 431, for changes in internal price levels between 1938 and 1949 and see Schedule A), and D still has his 100,000 lire which was worth only $176 if he could have converted it into Canadian dollars in 1949. (See Schedule A).

A's claim if valued in accordance with my recommendations is valued at $5,278 and he will be allowed interest from January 1, 1946. While this is a lesser amount than the dollar equivalent of B's undamaged and formerly similar property it is, as I have pointed out, a pre-war value and pre-war values can be ascertained in the great majority of the cases, taking countries of losses as a whole, while many post-war values cannot. While A receives less in dollars than the dollar sum representing the value of B's property he has the great advantage of getting dollars for his foreign property which many owners of undamaged property would be only too glad to receive. Thus the loser of physical assets while receiving a lower dollar equivalent has the advantage over the non-loser of being able in effect to export his capital plus interest. Similarly, C who would be awarded $176, with interest, enjoys a considerable advantage over D whose lira bank account while equivalent to $176 is probably available for use only in Italy.

While the conversion plan suggested may appear too favourable to the loser of physical assets as compared to the loser of money, or not favourable enough to the latter as compared to the former, it must not be overlooked that since 1939 it has been one of the fortunes of the times that holders of many types of physical assets have gained relatively to holders of money assets. This is the case in Canada as well as in other countries—it is one of the facts of economic life which have been experienced by many Canadians with property and cash in Canada. For these reasons I see no justification for the use of pre-war valuation of money claims if by valuation is meant the valuation of local currency as such and as distinguished from the valuation of what it will purchase. Assuming that physical assets are to be given pre-war values to be converted at pre-war exchange rates, and it is sought, while using a pre-war valuation in reference to money claims, to equate the treatment of money claimants as closely as possible to that of physical assets claimants, it seems to me that logically the course illustrated by the following hypothetical example might properly be followed. Assume the money claim to be for 10,000 units of local currency. Ascertain how many units pre-war would have bought what 10,000 units would buy post-war. Say this number as so ascertained is 1,000 units. Convert 1,000 units into Canadian dollars at pre-war rates of exchange. If the exchange rate has varied proportionately with the variation in the internal price level the figure resulting from the conversion will be exactly the same as if the 10,000 units were converted at post-war rates. To the extent that the changes in exchange rates have not kept pace with the upward changes in internal price levels, the money claimant is favoured by the course recommended as compared with the course just outlined as the logical one to be followed if pre-war valuation were used in reference to money claims.

It is one of the features of the conversion plan recommended that the money assets loser does as well at least as the non-loser of money assets and because of his ability to receive dollars as well as interest will generally do better.

In effect, my recommendations, if adopted, will tend to reduce the discrepancy which has generally developed over the period since 1939 between the values of the holdings of owners of physical assets on the one hand and the

values of the holdings of owners of money or rights to money on the other. I can see no justification for reducing this difference further. It is manifestly impossible to compensate Canadian owners of money assets all over the world any more than to compensate Canadians in Canada itself for the loss in purchasing power of their money. So, I cannot recommend treatment of the loser of money assets more favourable than that which I have recommended—indeed, as previously pointed out, in most cases he will be better off than the non-loser.

It should be added that in cases where compensation is otherwise provided for there will be the problem of determining the amount in Canadian dollars with which the claimant should be debited as against his admissible claim where such compensation is provided in other than Canadian currency. What exchange rate is properly applicable? While it is impossible to foresee exchange rate developments the general rule should, in my opinion, be that the principles underlying the choice of rates in Schedule A should apply, but with reference to date of receipt of the compensation otherwise provided for in each case, provided, however, that where (as in the case, for example, of the *S.S. Athenia* payments by the United Kingdom Government) the compensation shall before the adjudication have been actually received and converted into Canadian currency, the Commissioner may debit the claimant with the amount which actually became or becomes available to the claimant in Canadian currency.

Classification of War Claims

The terms of reference require a classification of war claims and an estimate of the number of each class and of the total amount of such claims. The information called for by this requirement is nearly all to be found in the foregoing parts of this report. The following additional information should, however, be given.

The number of claimants for compensation for property losses as disclosed by the files whose claims are *prima facie* valid is approximately 1,050. The number of persons who died and for compensation for whose deaths claims are disclosed by the files which are *prima facie* valid is approximately 25. The number of claimants for compensation for personal injuries as disclosed by the files whose claims are *prima facie* valid is approximately 90. It should, however, be added that there are very few claims on the files for compensation for personal injuries caused by maltreatment and it may very well be that the figure of 90 will be substantially increased. The number of persons interned in Japanese-operated internment camps in the Far East was as follows: prisoners of war approximately 1,750 as stated earlier, civilians approximately 800 including approximately 25 merchant seamen. The number of civilians detained otherwise than by internment in the Far East is believed to have been approximately 300.

The number of persons interned or detained elsewhere in respect of whom maltreatment awards will be payable under the foregoing recommendations is entirely uncertain both as to prisoners of war and civilians. There were, however, approximately 6,500 prisoners of war and 1,200 civilians interned in areas other than in the Far East. The number of civilians detained otherwise than by internment in such areas is believed to be approximately 1,000. The war claims for property losses excluding those by claimants apparently not Canadian at time of loss total approximately $50,000,000. (Parts of many of these claims are not admissible under the foregoing recommendations and no helpful estimate can be given of the total sum represented by the inadmissible portions of the claims). The claims for compensation for death total approximately $550,000. (This total gives no indication, even approximate, of the

total of the claims admissible under the foregoing recommendations). The claims for compensation for personal injury total approximately $260,000. (This total gives no indication, even approximate, of the total of the claims admissible under the foregoing recommendations).

No helpful estimate can be given either of the total amount of the maltreatment claims on file or of those which will under the foregoing recommendations be allowed.

It should, of course, be borne in mind that the total amounts claimed under each category as shown above will very likely be increased by claims to be received later.

Priorities

In the terms of reference there is a direction to recommend the priorities, if any, that should be established for payment of classes of claims and classes of claimants. I recommend that the claims be paid in the following order of priority:

(1) Claims for compensation for death and personal injury in full, or if the Fund is not sufficient to pay them in full, then *pro rata*.

(2) Claims for compensation for maltreatment in full, or if the balance in the Fund is not sufficient to pay them in full, then *pro rata*.

(3) Claims for compensation for property losses up to $5,000 in full, or if the balance in the Fund is not sufficient to pay them in full, then *pro rata*.

(4) All remaining claims for compensation for property losses up to an additional $10,000 in full, or if the balance in the Fund is not sufficient to pay them in full, then *pro rata*.

(5) All remaining claims for compensation for property losses up to an additional $15,000 in full, or if the balance in the Fund is not sufficient to pay them in full, then *pro rata*.

(6) All remaining claims for compensation for property losses up to an additional $20,000 in full, or if the balance in the Fund is not sufficient to pay them in full, then *pro rata*.

(7) All remaining claims for compensation for property losses in full, or if the balance in the Fund is not sufficient to pay them in full, then *pro rata*.

I have been asked to recommend the maximum sum of compensation, if any, that should be prescribed in relation to any class of war claims or claimants. I have concluded that if the foregoing order of priority is observed it is not necessary to prescribe a maximum sum of compensation (other than the $1,400 ceiling on maltreatment awards recommended earlier).

In my opinion, the funds available in the War Claims Fund will be much more than sufficient to meet the death, personal injury and maltreatment claims in full. How much will be available for distribution among property loss claimants is uncertain. I would expect the Fund to be sufficient to pay most or all of the claims up to the limits stated in headings (3) to (6) inclusive in full but that if any funds are then left a *pro rata* distribution or dividend under heading (7) will be necessary. Whether a further amount should be provided by Parliament to meet any unpaid residue of claims is a matter upon which I am not authorized to make a recommendation.

The reasons I recommend the foregoing order for priority of payment of claims are as follows. In my view the losses falling on individuals by reason of death or personal injuries represent a heavier loss to the persons affected

than the losses resulting from loss of or damage to business assets or investments. The claims for maltreatment are not for pecuniary losses and should rank after the death and personal injury claims. At the same time they partake of the nature of injuries to the person and should rank either in priority to the property claims or *pari passu* with such claims. On balance I think it would be advisable to let them rank ahead of the property claims. To do so has a great practical advantage in that payment of them may then in all probability take place shortly after the death and personal injury claims have been adjudicated instead of awaiting adjudication of the property claims, and with no difference in the end because it is altogether likely that the first priority of property claims can be paid in full. As to the property claims generally, while the loss of personal effects or of some kinds of real property such as homes may represent a heavier loss to the persons affected than the loss of business assets and investments, it is, in my view, impracticable to differentiate between different types of property losses for priority purposes. Property losses grade into one another and the arrangement of the priorities in the steps or stages suggested protects those who have suffered small property losses from too onerous a sharing of the Fund with those who have suffered large property losses. It has already been indicated as one of the principles upon which war claims should be paid that compensation should be designed to meet losses caused by the war of a specific nature falling heavily on a few individuals and not of a kind that falls on large classes of the community or the community as a whole. I consider it proper, therefore, in establishing a priority for payment of these claims to apply this principle to the claims themselves. As far as practicable, the losses which fall most heavily upon and affect most seriously the persons sustaining the losses should be paid first.

Account must be taken in each priority of satisfaction otherwise provided for (or already provided out of the Fund). For example, a claimant has a total admissible claim of $10,000 but has received, or will receive, satisfaction from sources other than the Fund to the extent of $5,000. If there were enough to pay claims only up to the limit set in priority (3) this claimant would receive nothing. He therefore will not share in priority (3) at all. He will, however, share in priority (4) if more funds are available.

Assuming that the recommendation is accepted that property claims should be paid on a basis of successive priorities, one of $5,000, one of $10,000, one of $15,000 and one of $20,000, account being taken of any instances of satisfaction otherwise provided for, it remains to examine how this will work out in practice.

Claimant A has sustained a valid war loss in China which is the equivalent of $6,000. Claimant B has sustained an identical loss in the Philippine Islands, but in his case he has received the equivalent of $500 from the Philippine War Damage Commission. Claimant A, having received no compensation from any source, will receive the full $5,000 under priority (3). Claimant B will receive $4,500 from the War Claims Fund under that priority, the equivalent of $500 received from the Philippine War Damage Commission being taken into account. Should funds be available to pay property claims up to $15,000 then each of these two claimants will subsequently receive an additional $1,000.

The next question to be considered is whether priorities are to be set up on the basis of claims or on the basis of claimants. For example, if a claimant has sustained a property loss in two countries, does he have separate priorities of $5,000, $10,000, $15,000 or $20,000, as the case may be, in respect of each of the two losses? Or if a claimant sustained two unrelated property losses on different dates in the same country, or losses of different species of property on the same date in the same country, how is he to be treated? Again, a shipping company loses three different ships on different dates. Should the company be given one priority only or what in effect are three priorities, one in respect of

each of the three losses? Upon consideration I have come to the conclusion that the priority should be given to the claimant *quâ* claimant and not to the claim *quâ* claim. This is because while there is little difficulty in determining what constitutes one claimant it is almost impossible to lay down satisfactory rules as to what constitutes one claim.

Where husband and wife have both claimed I recommend that each should have a priority. Where the claimants are two or more executors or administrators of an estate of a deceased person, only one priority of $5,000 (or as the case may be) should be allowed. Applying the same principle, where a person who, if he had lived, would have had a claim has died and on his death the claim survives for the benefit of his heirs who are, let us say, three in number, I recommend that each of the three heirs have a priority of one-third of $5,000 (or as the case may be). To recommend otherwise would be to establish priorities depending on whether or not the person sustaining the loss is living or dead, a consideration which is, or should be, an irrelevant factor. The only proper basis, I think, is the priority which the deceased himself would have received, had he still been alive at the time of the award on the claim.

A more interesting and difficult problem arises in connection with priorities for shareholder claims. If my recommendations on corporation and shareholder claims are accepted some corporations will be eligible to claim and some will not, while some shareholders will be eligible to claim and others will not. Suppose, for example, corporation X, a non-Canadian corporation, has sustained war damage to the extent of $100,000 and there has been no satisfaction from local sources. At time of loss two corporations in Canada, Y and Z respectively, each held 25 per cent of the share capital of X. This would mean, if both Y and Z were eligible to claim, that each would have a claim for $25,000. However, let us suppose that Y at time of loss was a Canadian and therefore eligible to claim, whereas Z is not a Canadian and therefore not eligible to claim. As Y is eligible to claim, shareholders in Y are not eligible to claim, whereas any shareholders in Z who were Canadians at time of loss are eligible to claim. Let us suppose that at time of loss A and B, individual shareholders, each held 25 per cent of the share capital of Y. Neither A nor B is eligible to claim. At time of loss C and D, individual shareholders and Canadians at that time, each held 25 per cent of the share capital of Z. Each, therefore, would have a claim for one-quarter of $25,000 or $6,250. The first priority is a payment of $5,000 on all property claims. Do corporation Y and shareholders C and D in corporation Z each enjoy a priority of $5,000? If all property claims can be satisfied up to $30,000 no problem will arise as corporation Y will receive $25,000 and shareholders C and D in corporation Z will each receive $6,250. But let us suppose that there is every reason to assume that at the most property claims can be paid up to $5,000. If Y, C and D were each to receive $5,000, A and B would in effect be discriminated against merely because Y happened to be able to claim. The solution lies in paying C and D each $1,250 on the first priority of $5,000 as $1,250 is half of what Y, in theory, receives on behalf of A and B together. This would mean that the claims of C and D would finally be satisfied only if all property claims are paid up to $30,000, and in theory A and B are in the same position. True enough, Y receives $25,000 at the same time that C and D have only received $6,250 each, but this represents the full extent of the claims in each case. Even if a priority of $30,000 cannot be reached there is no discrimination between A and B on the one hand and C and D on the other. Y has always received double what C and D together have received, but this arises due to the fact that aliens or non-Canadians at time of loss held 50 per cent of the share capital in Y. The indirect compensation of such persons could only be avoided by eliminating corporation claims entirely and only admitting shareholder claims, which I cannot recommend for reasons already given.

I should add that for priority purposes I do not think that interest and expenses allowed for establishing claims should be taken into account. If, for example, the principal of an award to a property loss claimant is $5,000 the third priority would give him priority for $5,000, interest thereon, and such expenses of establishing his claim, if any, as are allowed him.

In an earlier part of this report it was stated that the question whether there should be ceilings on awards for death and personal injuries would be dealt with under the heading "Priorities" and I now wish to deal with it.

The suggestion to be considered is that the amount payable as compensation for death or for personal injuries be limited in every case to an amount equal to the capitalized value of the pension which would have been payable under the Pension Act if the person killed or injured had been a member of the armed services. As pension awards vary with rank the adoption of such a ceiling would involve a classification of those for whose deaths or injuries compensation is claimed into assumed or notional ranks. One reason for a ceiling is the priority which is recommended for payment of death and personal injury claims. If a few awards are made in respect of death and personal injuries of sums far in excess of any sums which under the system of priorities recommended can be awarded to the smaller property losers, complaints of discrimination may arise. If circumstances of this kind should develop it would seem desirable either (a) that ceilings as suggested above be imposed, or (b) that the priorities system be changed so that death and personal injury claims, maltreatment claims and property claims will all be paid *pari passu*, the scale of priorities suggested for property claims being applied to all claims, or (c) that both (a) and (b) be done. As there are obvious objections to all of these alternatives and the circumstances pointing to the desirability of adopting any of them may not arise, I am recommending that none of them be adopted before the time limit for delivery of the claims is past. At that time, or later after some of the claims are adjudicated by the Deputy Commissioners, it may appear desirable either that ceilings be imposed on the death and personal injury claims or that the recommended priorities system be changed, or both. For this reason I do not think that the code of rules suggested below should, in so far as it negatives ceilings or establishes priorities on death and personal injury claims and then on maltreatment claims over property claims, should be adopted until the time limit for claims is past or somewhat later after there has been a sufficient number of adjudications by Deputy Commissioners to indicate the probable amounts which in the absence of ceilings would be awarded for the larger death and personal injury claims. This report is written on the assumption that there will be no ceilings and no changes in the system of priorities recommended, but despite that fact it should be understood that I am not recommending against such ceilings or changes in the system of priorities if the developments mentioned above as possible make them desirable.

I should add that as the selection of figures for the priorities recommendations is largely arbitrary, I would see no objection in principle to the insertion, if thought fit, between (6) and (7) above of another priority provision to read as follows:

> "All remaining claims for compensation for property losses up to an additional $50,000 in full, or if the balance in the Fund is not sufficient to pay them in full, then *pro rata*."

Claims up to $100,000 instead of $50,000 would then, in certain circumstances, have priority. Whether this limit should be $50,000 or $100,000 is in my view an evenly balanced question but I would definitely recommend against making it any higher than $100,000.

Interest

As my recommendation will be that interest be allowed as an element in awards of compensation arising from death, personal injuries and loss of or damage to property, it is necessary to state at the outset the rate of interest that should be allowed. Prevailing rates have varied since September, 1939, and I think that 3 per cent *per annum* would be a fair average and should be applied in all cases where interest is payable.

The subject of interest was given considerable attention by the Commissioners after the last war and I quote the following from Commissioner Friel's report dated December 14, 1927, Reparations, Vol. I, pp. 19 and 20:

> "In the matter of interest this Commission has not given consideration to any particular system of law. Interest in this country as a general thing is not recoverable except by statute or under agreement, and it is not allowed in actions for damages *ex delicto*, that is to say actions arising from losses independent of contract. At the same time it may be said, broadly speaking, in the words of counsel that the claim is a legal claim under the civil law, under the common law as developed in the United States, and under the common law of Great Britain except in so far as modified by express statute. It has always been allowed in maritime cases. Dr. Pugsley recommended that interest should be allowed from the date of the ratification of the Treaty, that is January 10, 1920, until the date of settlement. He fixed that date he said as applicable to all wrongs whether they were personal or injuries to property because on that day it seemed to him Germany became bound by a contract, and what was to that date a tort became converted into a contractual obligation. He thought it better to make it uniform as to date because torts do not ordinarily carry interest as such, but when they become contracts then he thought interest should necessarily follow. By reason only of its seeming fair I have followed this course in respect to unliquidated damages covering claims for losses based on personal injury, death, maltreatment of prisoners of war or acts injurious to health; but where the loss was either liquidated or the amount thereof capable of being ascertained with approximate accuracy through the application of established rules of computation merely, as of the time when the actual loss occurred, I have recommended interest from the date of loss. This covers property losses being claims for property taken, damaged or destroyed. It seems to me to be only just and equitable. The measure of damages applied is the reasonable market value of the property as of the time and place of loss or destruction, if it had such market value; if not, then the intrinsic value of the property, but as compensation was not made at the time of loss the payment at a later date of the value which the property had at the time of loss would not make the claimant whole. He was *then* entitled to a sum equal to the value of his property. He is *now* entitled to such sum plus the value of the use of the money for the entire period during which he was deprived of its use, otherwise interest, if he is to receive full compensation. Five per cent was the rate of interest prescribed by Paragraph 16 of Annex II to Section I of the Part VIII of the Treaty of Versailles, by which interest is debited to Germany as from May 1, 1921, in respect of her debt as determined by the Reparation Commission, and in fixing that date it was provided that account might be taken of interest due on sums arising out of the reparation of material damage as from November 11, 1918, up to May 1, 1921."

As compensation for death is to be on the basis of pecuniary loss alone and the loss would substantially take place in the ordinary case immediately after the death, a claimant for compensation for death should be paid interest on the principal amount of the award from the date of the death except on such parts of that principal amount as are analogous to special damages, which should bear interest only from the respective times of disbursement by the claimant or those through whom he claims, and except in cases of claims for compensation for death in internment. A claimant for compensation for death in internment should be paid interest from the date when the deceased would normally have been liberated from internment had he been alive (because the loss did not take place until that time) but subject to the exception that if any part of the amount paid is analogous to special damages such part shall bear interest only from the time when the disbursement was made by the claimant or those through whom he claims.

For similar reasons, a claimant for compensation for a personal injury should be paid interest on the amount of the principal from the date of the personal injury (or if it was inflicted by maltreatment in internment or detention, from the date of liberation) except on such parts of the principal as are analogous to special damages, upon which interest should be paid only from the respective times of disbursement by the claimant or those through whom he claims.

For the reasons indicated in the sections dealing with property losses and valuations, a property loss on the high seas should be deemed to have taken place when the property was physically lost or damaged and the award should bear interest from the date of that loss or damage. But all other property losses should bear interest only from January 1, 1946. The reason for not allowing interest from an earlier date is the assumption that as a general rule the property, if it had not been lost or damaged, would, being normally in enemy or enemy-occupied areas, not have yielded financial benefits to the owner until the end of a reasonable period after the termination of hostilities. This consideration does not apply to losses on the high seas. While conceivably there may be good claims for losses not on the high seas and not in enemy countries or enemy-occupied areas, none appear from the files and I think January 1, 1946, should be accepted as the universally applicable date for losses not on the high seas.

As to compensation for maltreatment, as distinguished from personal injuries arising from maltreatment, I recommend that no interest be paid as the maltreatment awards are not to be made on the basis of pecuniary loss.

Interest in all cases should run to time of settlement and should not be compounded.

The propriety of allowing interest on compensation for personal injuries and death may be questioned. As Commissioner Friel says in the passage above quoted, interest is not allowed in actions for damages *ex delicto* in the courts of this country. At least this is the general rule. However, the English courts have power under section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, to allow interest in any proceedings tried in any court of record for the recovery of any debt or damages. Under that Act the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit, on the whole or any part of the debt or damages, for the whole or any part of the period between the date when the cause of action arose and the date of judgment. There are several reasons why compensation for personal injuries and death should include an element of interest. For one thing, if it be admitted that interest from time of loss

is a proper element of compensation for property losses, it is hard to see why a similar rule should not apply to losses caused by personal injury and death as the compensation to be paid is limited to pecuniary loss just as in the case of property losses. The allowance of interest on property losses from time of loss seems to have been recognized after the last war by all Commissioners as appropriate and just. Indeed, the justice of it is apparent when one considers the long delay which inevitably there has been and will be before the losses are settled, a delay which applied to the death and personal injury claims as well as to the property claims. Then too, interest was allowed as an element of compensation in the claims for death and personal injury asserted after World War I and some of the later awards included very large proportions of interest. I think that interest should be included as an element in compensation for the pecuniary loss resulting from death and personal injuries but it must be admitted that the question as to the date or dates from which this interest should run is debatable. It may be that an arbitrary date, say January 1, 1946, should be selected, but in my opinion the selection of such a date would be unfair as between claimants the dates of whose losses might be several years apart. If it is deemed too generous to claimants for personal injuries and death, and too much out of line with the precedents, to allow interest from the dates recommended above I could only recommend as an alternative the elimination of interest for an arbitrarily selected number of years, say five, in each case. As an example, this would mean that a claimant who suffered personal injuries in 1939 would receive compensation determined on the principles set out above but would receive interest thereon only from 1944, while a claimant who received personal injuries in 1945 would receive compensation determined on the principles set out above with interest from 1950. There would be one advantage in using the alternative rule suggested: if five years' interest is deducted from the amount computed as set out above I think that all the interest in each case could run from the same date as most of the hospital and medical expenses and other expenditures analogous to special damages would have been made within the five year period.

On balance I am inclined to think that the recommendations I have made with reference to interest on personal injury and death claims should stand, but the balance is an even one between this and the alternative recommendation that I have suggested, and it may very well be that having in mind the general rule applicable in the civil courts and the course which was followed after World War I the Government will wish to adopt my alternative recommendation.

Limitation of Time for Filing Claims

I recommend that upon the establishment of tribunals for adjudicating war claims every reasonable effort should be made to give adequate publicity to the existence of these tribunals and to the nature of their functions. At the time this publicity is given notice should be given by advertisement that if any person wishing to claim has not already given notice to a department of the Government of his claim he must do so within a specified period from the date of the advertised notice and that if he does not do so within that period his claim will not be entertained. In my view a period of six months would be adequate. At the end of that period the hearings and adjudications by the tribunals could begin. It may even be found possible for the tribunals to hear many of the claims before the expiration of the six months' period if they feel that doing so will not entail unnecessary travel to adjudicate claims which will be presented later.

War Claims Tribunals

Establishment

Before putting forward my recommendations under this heading I should like to make certain general recommendations based upon the experience of tribunals established in Canada after World War I to deal with war claims. These tribunals had the judicial function of determining whether claims put forward by claimants fell within the category of claims for which compensation should be paid. Their duty was to determine the eligibility of claims under treaty provisions. These provisions were of a somewhat wide and indefinite nature and left much discretion to the tribunals.

After World War I four successive Commissions were established to deal with claims. The last claims were not finally disposed of until 1933. Each tribunal consisted of one Commissioner and the available records indicate that these Commissioners discharged their duties with great ability, fairness and consistency.

However, in my opinion, if so long a delay now takes place in dealing with the claims arising out of World War II it will to a great extent defeat the purpose of payment of the compensation. In many cases individuals will have died. In other cases while the compensation if promptly paid might assist the individual to meet the loss sustained it will, if payment is deferred too long, come merely as an unexpected wind-fall after the claimant has been compelled to overcome his loss in some other way. Then too, if compensation is to be paid to persons dependent upon another upon whose death the war claim arises, unless compensation is paid promptly it may be of little use to the dependents.

I consider that it is of prime importance that war claims, particularly those of individuals, be dealt with as expeditiously as possible and that payment be made at as early a date as possible. One cause of delay in the past was the vagueness of the terms of reference to the tribunals which made it necessary in the interests of fairness and consistency for every claim to be dealt with as far as possible by the same tribunal. I therefore recommend that before the setting up of a tribunal or tribunals there should be established a code defining the war claims that are admissible and settling the basis upon which the compensation is to be determined. I recommend that then several tribunals be established at convenient points throughout Canada to deal with claims. Each tribunal should consist of a Deputy Commissioner who should have the assistance of a registrar or secretary. There should be a Chief Commissioner with a sufficient staff to enable him to discharge his duties to be outlined. The function of each Deputy Commissioner with reference to each claim coming before him would be to find the facts and to recommend whether any, and if so, what amount should be paid in respect of the claim out of the Fund, having regard to satisfaction otherwise provided for, but subject to the application of such priority provisions as may be applicable. The Deputy Commissioner would report his findings and recommendation, with his reasons therefor, to the Chief Commissioner, who would review and either approve, with or without variations, or reverse the Deputy Commissioner's findings and recommendation. If the Chief Commissioner approves without variation the Deputy Commissioner's findings and recommendation he should, if it is a case where the priority provisions are applicable, apply those provisions and make his recommendation in respect of the claim to the Government. If the Chief Commissioner is of opinion that he should not approve without variation the Deputy Commissioner's findings and recommendation, he should, before making his final decision with respect to them, refer the report back to the Deputy Commissioner for further consideration and report and, after receiving the

further report from the Deputy Commissioner, make his recommendation on the claim to the Government after applying the priority provisions, if applicable; but before he makes his recommendation to the Government he should, if his proposed recommendation departs from the Deputy Commissioner's recommendation adversely to the claimant, communicate with the claimant stating briefly what his proposed recommendation to the Government will be and his reasons for departing from the Deputy Commissioner's recommendation and inviting expression of the claimant's views in writing, such communication to be made long enough before the Chief Commissioner's recommendation to the Government to enable the claimant to make written representations to the Chief Commissioner.

The Chief Commissioner should convene a meeting or meetings of the Deputy Commissioners for the consideration of problems arising or likely to arise generally. The appointment of a number of Deputy Commissioners would greatly expedite disposition of the claims, and establishment of a relatively detailed code would leave little more to the discretion of any Commissioner than a Judge would ordinarily exercise in the discharge of his duties.

Procedure

With respect to the procedure to be followed by the tribunals I recommend that the following steps be taken:

(1) The Chief Commissioner or the War Claims Branch of the Department of the Secretary of State should furnish to each Deputy Commissioner a list of the claims of persons to be dealt with by the Deputy Commissioner together with the material that the claimants have submitted.

(2) The registrar or secretary of the Deputy Commissioner should give notice to each claimant of the Deputy Commissioner's intention to hear his claim at a fixed time and place and should permit the claimant to come forward, make representations and submit evidence.

(3) It should not be necessary for the claimant, but he should be free, to be represented by counsel in order to have his claim considered.

(4) Upon a claim being approved by the Chief Commissioner he should, as indicated above, make a recommendation to the Government of the payment to be made. Such recommendation would, of course, not confer on the claimant a legal or enforceable right to the payment recommended, but would normally, I have no doubt, be accepted and acted upon by the Government.

In my opinion, the foregoing procedure would permit a thorough investigation of each claim without imposing unnecessary formality of presentation and consideration of the claims. At first glance it would appear that the procedure is unusual in that only the claimant would be represented in the proceedings, no person appearing to oppose the claim. I do not think that the Deputy Commissioners should be authorized to engage the services of counsel or that they should be furnished with counsel except from Government departments. The Commissioners appointed after the last war dealt with the large number of claims before them without the assistance of counsel and in an eminently satisfactory manner. Moreover, as I shall point out below in dealing with the rules of evidence to be followed, the nature of the issues in these claims will be such that they cannot be thrashed out in the manner in which issues are explored in ordinary lawsuits. Each Commissioner will, of necessity, have to act on general knowledge and will have to accept evidence that will not ordinarily be accepted in courts of law. To make the procedure too rigid or formal would almost inevitably involve either large expense on the part of the claimant in proving his claim to the last formal detail, or complete rejection of the claim.

Evidence

I make the following recommendations with respect to evidence:

(1) Subject to the qualifications I mention below the burden of establishing the validity of a war claim and the proper amount to be paid should rest upon the claimant.

(2) The ordinary rules of evidence should not apply and any testimony or documents should, at the Commissioner's discretion, be admissible as evidence, the question of the weight to be given to the evidence as proof being one for the Commissioner (Deputy Commissioner or Chief Commissioner as the case may be).

(3) The Chief Commissioner before hearings by the Deputy Commissioners commence should make such rules regarding the admissibility of evidence and the necessity of corroboration as he thinks desirable to enable him and the Deputy Commissioners to carry out their duties. In many cases it may be undesirable to base recommendations on uncorroborated evidence of claimants. Instances which come to mind are evidence of the amount of currency lost, the value of jewellery, works of art, and so forth, and many other instances can be envisaged.

(4) In order to aid both the claimants and the Deputy Commissioners in obtaining evidence as to claims and the corroboration of evidence, the Chief Commissioner should have a staff of well-qualified persons whose duty it would be to go through the file of each claim before it is sent to a Deputy Commissioner and to place on the file a memorandum as to corroboration and general information that the Deputy Commissioner might need. For example, where a person claims compensation for maltreatment in internment, the fact and duration of his internment could be confirmed before the file is sent to the Deputy Commissioner. Again, if a claim is made for compensation for the loss of a house alleged to have been damaged or destroyed it might be possible for the Chief Commissioner's staff through the appropriate department of Government to make inquiries as to whether the house was in fact damaged or destroyed and possibly as to the extent of the damage. Or, in claims for losses of personal property alleged to be on board a ship sunk by enemy action, possibly the quantity of luggage could be ascertained. It would seem that in this way a great deal of useful evidence, corroborative or otherwise, could be procured. In the case of claims for property losses the Chief Commissioner should be free to require the Deputy Commissioner to take special measures to ascertain the relevant facts, such as, for example, the making of arrangements for taking evidence abroad.

The Chief Commissioner should attempt as far as possible to provide through his staff such facilities as are practicable to enable claimants to obtain evidence inexpensively and expeditiously.

Each Commissioner should have all the powers of Commissioners appointed under the Inquiries Act, so that evidence may be obtained at the instance of a Commissioner, whether the production of such evidence is desired by the claimant or not.

The reasons for the foregoing recommendations under the heading of "Evidence" are, I think, obvious.

General

The Chief Commissioner should be empowered and should feel free to recommend amendments to the code from time to time in the light of the experience gained by himself and the Deputy Commissioners, if the making of the amendments will do no injustice to and work no discrimination against the claimants whose claims shall have then been disposed of.

While the word adjudication is freely used in this report as describing hearings and decisions by Commissioners, it is apparent from the nature of their duties as just outlined that their functions will be administrative or advisory rather than judicial in any strict sense of the term.

Order in Which Claims Should be Dealt With and Paid

It will be apparent from the list of recommended priorities that all the death and personal injury claims can be paid shortly after they are all reported on and considered by the Government, and that each claim may be paid as soon as reported on and considered by the Government if the total claimed, before the time limit, for death and personal injuries claims does not exceed the amount in the Fund. As the total of death and personal injury claims is almost certain to be far less than the amount of the Fund, I would expect it to be possible for each death and personal injury claim to be paid very shortly after adjudication of that claim. A similar observation applies to the maltreatment claims. It applies also to the property claims up to the limits recommended in some of the higher priorities. There would, therefore, appear to be no good reason to adjudicate the claims of any particular class before those of any other class. The larger property claims may not finally be settled for years because there may be additions to the Fund by transfers from the Custodian and by receipts from IARA, but this possibility will not prevent the expeditious satisfaction of claims in the higher priorities.

Disposition of Surplus

If, after satisfaction of all admissible claims in accordance with the foregoing recommendations, there is money still in the Fund, this surplus should be paid into the Consolidated Revenue Fund. There is nothing inappropriate about using reparations to compensate Canadians generally *pro tanto* for the huge costs of the war. Their claim should be regarded as one having the lowest priority but still having a possible place in the scheme of distribution. As it is not improbable that the death, personal injury and maltreatment claims will use up $4 or $5 million of the Fund, and as the property claims, exaggerated as many of them are, by the standards of the foregoing recommendations, amount to approximately $50,000,000 and the total amount in the Fund that can be counted on with any approach to certainty is less than $10,000,000, it is improbable that there will be a surplus.

Discretionary Powers

The recommendations in this report are perhaps too detailed. They are made so for the purpose of helping the Government and the Commissioners to thread their way through a labyrinth. Possibly more than envisaged above should be left to the discretion of Commissioners, even though more discrimination than that which is obviously inevitable would result. After World War I

the Canadian Commissioners in some cases leaned heavily on the first sentence of Para. 11 of Annex II of Part VIII of the Treaty of Versailles, which is as follows:

> "The Commission shall not be bound by any particular code or rules of law or by any particular rule of evidence or of procedure, but shall be guided by justice, equity and good faith."

In the establishment of a code of rules as recommended above, while no wide-open discretion should be conferred, as this might lead to unnecessary discrimination, there may be certain matters as to which the rules themselves should provide in a limited way for the exercise of individual discretion. It is impossible to specify these matters with any confidence that the list will be complete in advance of hearings, but after a number of typical claims in each class are heard and before decisions thereon are rendered, the Chief Commissioner should feel free to recommend the inclusion in the rules of provisions conferring discretionary powers.

Legislation and Orders in Council

I am making no recommendations as to what legislative or executive acts may be necessary to carry out the recommendations in this report, this being primarily a matter for the law officers of the Crown.

Acknowledgment and Conclusion

I should like to acknowledge with deep appreciation the invaluable assistance in this inquiry and the preparation of the report which I have received from members of the civil service in several departments of Government including the Departments of the Secretary of State, Justice, Finance, External Affairs, National Defence, Veterans' Affairs and Citizenship and Immigration, particularly from the Director and staff of the War Claims Branch of the Department of the Secretary of State.

Schedule A

Approximate value in terms of Canadian dollars of the following currencies as at December 30, 1949

Country	*Unit*	*Rate*	*Source of quotation and remarks*
Austria	schilling	.0514976	International Financial Statistics See footnote (a)
Belgium	franc	.0220	International Monetary Fund parity See footnote (b)
Bulgaria	lev	.00381944	International Financial Statistics (Dec. 15)
Channel Islands	pound	3.0725	Sterling area
Czechoslovakia	koruna	.0220	International Monetary Fund parity
Danzig	gulden	.1835518	See footnote (c)
Estonia	kroon	.2594338	See footnote (d) (I kr.=1·25 roubles)
Finland	markka	.0047619	International Financial Statistics
France	franc	.0031488	International Financial Statistics
Germany	deutschemark	.2622169	Federal Reserve Bank See footnote (e)
Greece	drachma	.000073238	International Financial Statistics
Hungary	forint	.092983	International Financial Statistics See footnote (f)
Italy	lira	.0017633	International Financial Statistics
Lithuania	lita	.1867924	See footnote (g) (1 lita=·90 roubles)
Luxembourg	franc	.0220	International Monetary Fund parity
Monaco	franc	.0031488	See French franc
Netherlands	florin	.289474	International Monetary Fund parity See footnote (h)
Norway	krone	.1540	International Monetary Fund parity
Poland	zloty	.0027363	International Financial Statistics
Roumania	leu	.0071896	International Financial Statistics
United Kingdom	pound	3.0725	Sterling area
U.S.S.R.	rouble	.207547	Nominal. 5·30 roubles=$1 U.S.
Yugoslavia	dinar	.0220	International Monetary Fund parity
British North Borneo	Malayan dollar	.358458	Sterling area. 2/4
Brunei	Malayan dollar	.358458	Sterling area. 2/4
Burma	rupee	.2304379	Par with India
China	Shanghai dollar (yuan)	.000052381	Federal Reserve Bank (21,000 Sh=$1.00 U.S.)
Hongkong	Hongkong dollar	.19203	Sterling area. 1/3
Indo-China	piastre	.05358	International Financial Statistics (Jan. 10)
Indonesia	florin	.289093	International Financial Statistics (Dec. 15)
Japan	yen	.0030555	International Financial Statistics (Dec. 15)
Malaya	Malayan dollar	.358458	Sterling area. 2/4
Philippines	peso	.55	International Monetary Fund parity
Thailand	baht	.047109	International Financial Statistics (Dec. 15)

In converting into Canadian terms parity rates quoted by the International Monetary Fund and those obtained from International Financial Statistics and the Federal Reserve Bank the Foreign Exchange Control Board official buying rate of 1·10 has been used.

In the case of sterling area territories the official sterling equivalent has been used converted into Canadian terms at the Foreign Exchange Control Board official buying rate of 3·0725.

(a) In March, 1938, when Austria was incorporated into the German Reich the schilling currency was replaced by the reichsmark. The schilling was reintroduced as the national currency in November, 1945.

(b) In the fall of 1944 bank balances in Belgium except for 10 per cent or the balances at May 9, 1940, whichever was the greater, were blocked and, apart from further nominal releases, were subject to individual investigation and justification of the source of the increase over May 9, 1940. Depending upon the circumstances in each case a progressive tax ranging up to 100 per cent was imposed upon such blocked balances.

(c) As from September 30, 1939, the gulden became no longer legal tender in Danzig being replaced by the reichsmark. During the month prior to September 30, 1939, the gulden was exchangeable for reichsmarks on the basis of 1 gulden = ·70 reichsmark.

The quotation appearing above—for what it is worth—represents the equivalent of ·70 deutsche mark without taking into consideration the reorganization of the German currency which resulted in the introduction of the deutsche mark. (See footnote (e)).

(d) The existence of an independent currency for Estonia came to an end with the incorporation of that state into the U.S.S.R. in 1940, the circulating medium from November 25, 1940, being the rouble. At that time conversion of kroons into roubles was made on the basis of 1 kroon = 1·25 roubles. The quotation for the kroon is given above on this basis.

(e) With the introduction of the deutsche mark about the end of June, 1948, credit balances were converted into deutsche marks at the rate of one deutsche mark for every ten old marks. After conversion only one-half of the proceeds were credited to free deutsche mark accounts, the remainder being placed in blocked deutsche mark accounts. In October, 1948, it was enacted that of every ten marks held in blocked deutsche mark accounts seven were to be cancelled, two transferred to free deutsche mark account, and one made available for investment in securities. Accordingly, every 1,000 marks originally held ultimately produced only 65 deutsche marks.

(f) Following occupation by the Russian army in 1945, the pengo passed through a period of hyperinflation which ended on August 1, 1946, when it was replaced by the forint, the rate of conversion being 400 octillion pengoes (400 followed by twenty-seven zeros) to one forint. The official exchange rate was fixed at 11·7393 forints to one dollar. Since then, one kilogram of fine gold equals 13,210 forints, which corresponds to 1 forint equal to 0·0757 gram of fine gold. In May, 1946, during the last stage of the inflation that destroyed the pengo, an auxiliary currency, the so-called tax-pengo was brought into circulation; this currency was converted at the rate of one forint to 200 million tax-pengoes.

(g) The existence of an independent currency for Lithuania came to an end with the incorporation of that state into the U.S.S.R. in 1940, the circulating medium from November 25, 1940, being the rouble. At that time conversion of litas into roubles was made on the basis of 1 lita = ·90 rouble. The quotation for the lita is given above on this basis.

(h) Measures for the "rehabilitation" of the currency instituted by the Netherlands authorities in 1945 involved the blocking of guilder accounts on September 26 of that year. Releases from blocked account were permitted from time to time for specified purposes but the bulk of the funds could be employed only in Government bonds and taxes were levied on increments during the war years.

Schedule B

Approximate value in terms of Canadian dollars of the following currencies as at June 30, 1939

Country	*Unit*	*Rate*	*Source of quotation and remarks*
Austria	schilling	.268225	See footnote (a)
Belgium	franc	.0341	FRB certified rate for belga: 5 francs=1 belga
Bulgaria	lev	.01215	FRB certified rate
Channel Islands	pound	4.69577	FRB certified rate
Czechoslovakia	koruna	.034404	London "Economist"
Danzig	gulden	.1888	London "Economist"
Estonia	kroon	.2575	London "Economist"
Finland	markka	.0206	FRB certified rate
France	franc	.026568	FRB certified rate
Germany	reichsmark	.402343	FRB certified rate
Greece	drachma	.008592	FRB certified rate
Hungary	pengo	.1962	FRB certified rate
Italy	lira	.05278	FRB certified rate
Lithuania	lita	.16779	London "Economist"
Luxemburg	franc	.042625	see footnote (b)
Monaco	franc	.026568	see French franc
Netherlands	florin	.5325	FRB certified rate
Norway	krone	.2359	FRB certified rate
Poland	zloty	.188675	FRB certified rate
Roumania	leu	.007058	FRB certified rate
United Kingdom	pound	4.69577	FRB certified rate
U.S.S.R.	rouble	.18928	London "Economist"
Yugoslavia	dinar	.02275	FRB certified rate

In converting Federal Reserve Bank certified rates into Canadian terms the rate of 1·00$^{21}/_{64}$ has been used.

Quotations from the London "Economist" are the mean of the range of business as reported, converted at 4·69$^{5}/_{8}$.

(a) In March, 1938, when Austria was incorporated into the German Reich, schillings were exchanged for reichsmarks at the rate of 1·50 schillings per reichsmark. The quotation given above is based on the German reichsmark in this ratio.

(b) Following a special decree of the Grand Duchy dated April 1, 1935, the Luxembourg franc was at this period equal to 1·25 Belgian francs. The quotation is based on the Belgian franc in this ratio.

Schedule C

Approximate value in terms of Canadian dollars of the following currencies as at June 30, 1941

Country	*Unit*	*Rate*	*Source of quotation and remarks*
British North Borneo	Straits dollar	.5168	Sterling area. 2/4 per Straits dollar
Brunei	Straits dollar	.5168	Sterling area. 2/4 per Straits dollar
Burma	rupee	.33225	Sterling area. 1/6 per rupee
China	Shanghai dollar	.0587125	FRB certified rate
Hongkong	Hongkong dollar	.276875	Sterling area. 1/3 per Hongkong dollar
Indo-China	piastre	.2515	Samuel Montagu & Co., London, "Review of Foreign Exchanges"
Indonesia (Netherlands East Indies)	florin	.5829	Samuel Montagu & Co., London, "Review of Foreign Exchanges"
Japan	yen	.257825	FRB certified rate
Malaya	Straits dollar	.5168	Sterling area. 2/4 per Straits dollar
Philippine Islands	peso	.546575	Samuel Montagu & Co., London, "Review of Foreign Exchanges"
Thailand	baht	.4061	Samuel Montagu & Co., London, "Review of Foreign Exchanges"

In converting Federal Reserve Bank certified rates to Canadian currency the Foreign Exchange Control Board official buying rate of 1·10 has been used.

In the case of sterling area territories the official sterling equivalent has been used converted into Canadian terms at the Foreign Exchange Control Board official buying rate of 4·43.

Quotations from Samuel Montagu & Co.'s "Review of Foreign Exchanges" are the mean of the range of business as reported, converted at the Foreign Exchange Control Board official buying rate of 4·43.